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JSN
JAM
MAN
v. 10

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Courts of Exchequer & Exchequer Chamber,

FROM

TRINITY TERM, 5 VICT.

TO

MICHAELMAS VACATION, 6 VICT., BOTH INCLUSIVE;

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY

R. MEESON, Esq., AND W. N. WELSBY, Esq.,

OF THE MIDDLE TEMPLE, BARRISTERS-AT-LAW.

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JUDGES
OF THE
COURT OF EXCHEQUER,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable JAMES, Lord ABINGER,
Chief Baron.

BARONS.

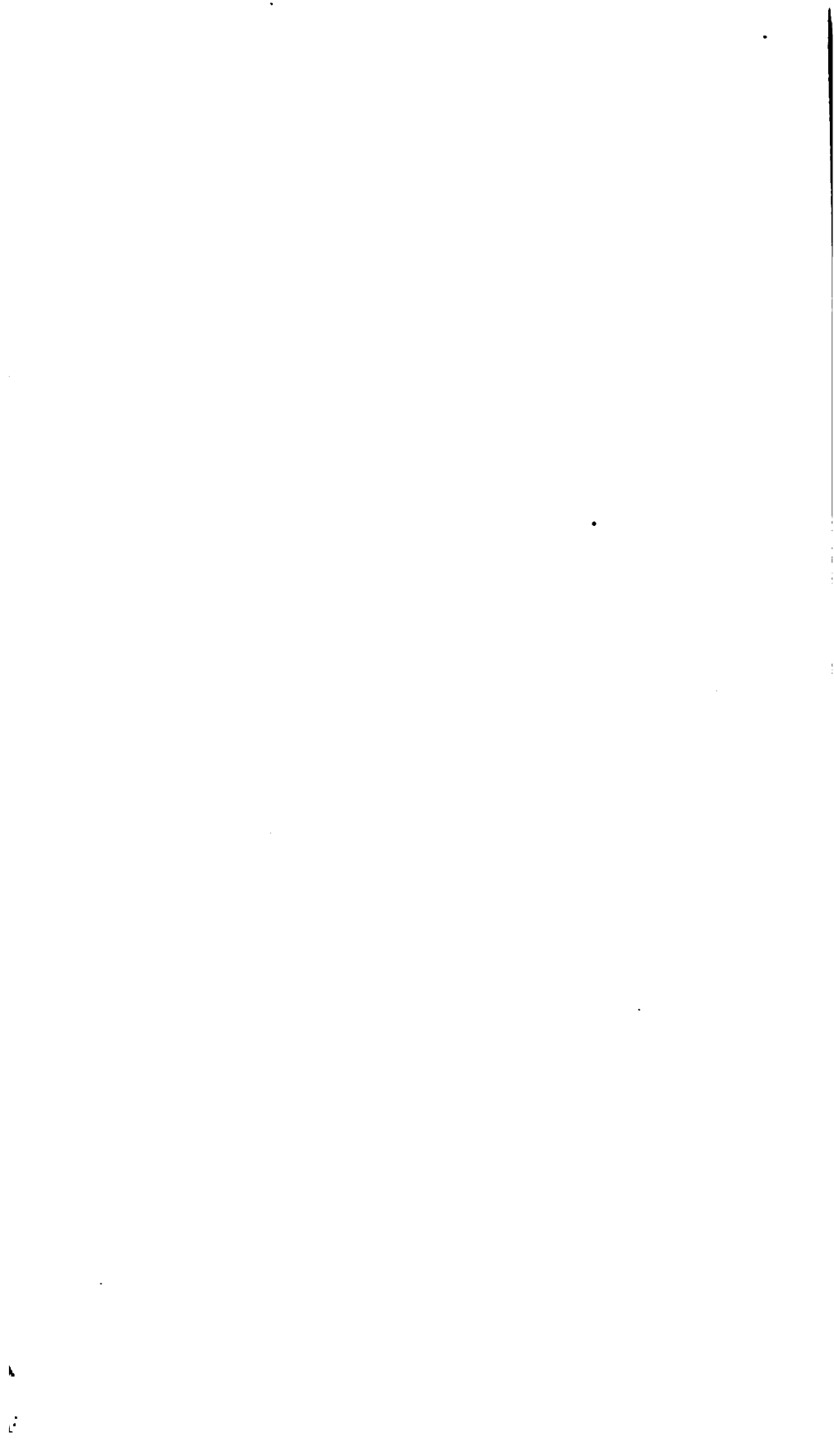
The Right Honourable Sir JAMES PARKE, Knt.
Sir EDWARD HALL ALDERSON, Knt.
Sir JOHN GURNEY, Knt.
Sir ROBERT MONSEY ROLFE, Knt.

ATTORNEY-GENERAL.

Sir FREDERICK POLLOCK, Knt.

SOLICITOR-GENERAL.

Sir WILLIAM WEBB FOLLETT, Knt.



A

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ERRATA.

P. 85, l. 24 of marginal note, *delete the words* pleadings or.

P. 454, l. 22, *read* "The second plea set out the indenture in hæc verba," &c.

P. 482, l. 3 from bottom, *for* them *read* then.

P. 483, l. 6 from bottom, *for* the rule *read* no rule.

P. 594, l. 16, and 595, l. 13, *for* Teo *read* Yeo.

P. 630, l. 5, *for* 1730 *read* 1735.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

TRINITY TERM, 5 VICTORIÆ.

SMOUT v. MARY ANN ILBERY.

Exch. of Pleas,
1842.

May 23.

DEBT for goods sold and delivered, and on an account stated.

Pleas, first, except as to 6*l.* 7*s.*, parcel, &c., nunquam indebitatus; secondly, except as to the said sum of 6*l.* 7*s.*, parcel, &c., payment; thirdly, as to the sum of 6*l.* 7*s.*, parcel, &c., payment into Court of that sum, and nunquam indebitatus ultra. The replication took issue on the first plea, denied the payment alleged in the second, and accepted the 6*l.* 7*s.*, in satisfaction as to so much of the debt demanded.

Where a man who had been in the habit of dealing with the plaintiff for meat supplied to his house, went abroad, leaving his wife and family resident in this country, and died abroad:—*Held*, that the wife was not liable for goods supplied to her after his death,

but before information of his death had been received; she having had originally full authority to contract, and done no wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge relating to it; the revocation itself being by the act of God, and the continuance of the life of the principal being equally within the knowledge of both parties.

Exch. of Pleas,
1842.

SMOUT
v.
ILBERY.

At the trial before *Gurney, B.*, at the Middlesex Sittings in Michaelmas Term, 1841, it appeared that the plaintiff was a butcher, and the defendant the widow of James Ilbery, who left England for China in May, 1839, and was lost in the outward voyage, on the 14th October, 1839. The news of his death arrived in England on the 13th of March, 1840. The plaintiff had supplied meat to the family before Mr. Ilbery sailed, and during his voyage, and the supply continued down to the time of the news of his death, and even afterwards. Upon the 14th October, 1839, the day of Mr. Ilbery's death, the amount of the debt was 52*l.* 13*s.* 11*d.* Between that day and the arrival of the news of the death, meat had been supplied to the amount of 19*l.* 9*s.*; and after that, the supply amounted to 6*l.* 7*s.*

This action was brought for these two sums (together) 25*l.* 16*s.* The defendant paid 6*l.* 7*s.* into Court, and relied on a payment of 20*l.*, as discharging her from the plaintiff's claim for meat supplied after the date of her husband's death; and the counsel for the defendant gave in evidence the following receipt signed by the plaintiff, dated the 30th March, 1840:—"Received of Mrs. Ilbery, 20*l.*."—The plaintiff insisted that the 20*l.* had been paid generally on account, and must be applied as a payment by the executors in part satisfaction of the debt of the husband; and called Mr. Dollman, the executor. From his evidence it appeared, that Mr. Ilbery had left the management of his affairs in his hands, and whenever Mrs. Ilbery wanted money, she had it from him. Dollman and Mrs. Ilbery were, by Ilbery's will, appointed executor and executrix; but he alone proved the will, on the 21st March, 1840, power being reserved in the usual way for her to prove also. On the 28th March, Mr. Dollman gave Mrs. Ilbery five or six cheques, and among others, one for 20*l.*, payable to the plaintiff. This cheque she paid to the plaintiff, and took his receipt as above mentioned.

At that time it was supposed that Ilbery's estate was solvent. It turned out to be otherwise; and Dollman, who was engaged with him in the adventure to China, had become bankrupt.

Esch. of Pleas,
1842.
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The question left to the jury was, whether the 20*l.* was paid on the executorship account, or on the account of Mrs. Ilbery only, and in discharge of that debt which (on both sides, as well as in the learned Judge's opinion) was taken to have been due from her.

The jury found that it was paid on the executorship account, and gave their verdict for the plaintiff for 19*l.* 9*s.*, the price of the meat supplied between the day of Mr. Ilbery's death, and the arrival of the intelligence of it. A rule having been obtained in Michaelmas Term to shew cause why that verdict should not be set aside, and a new trial had, on the ground that the defendant was not liable for the meat supplied after, but before she had any knowledge of, her husband's death (*a*),

Hindmarch (*Jervis* was with him) shewed cause in the Vacation after last Hilary Term.—There is no question here as to the appropriation of payments, as the jury have found that the £20 was paid on the executorship account. The only question is, whether the defendant (the widow) is liable for meat supplied to her from the time of her husband's death, until it became known in this country. It will be said on the other side, that the widow is not liable for meat supplied before the news of his death arrived, because she did not contract as his widow on her own account, but on her husband's credit. To support that proposition, it will be incumbent on the defendant to make out that the executor is liable, but that she cannot do, for the contrary was expressly held in *Blades v. Free* (*b*).

(*a*) This point was not made at the trial, and therefore there could be no motion for a nonsuit. (b) 9 B. & Cr. 167; 4 Man. & Ry. 282.



price. If a man supplies goods to another, and he has them and uses them, the law will imply a promise by him to pay for them. [*Alderson*, B.—The question is this, whether, where an agent contracts in the name of a principal, and it turns out afterwards that there is no principal, and there is no fraud in the case, the agent is liable as the principal. That is distinguishable from the case where he knows he has no principal, as in *Polhill v. Walter* (a). This question is a good deal discussed in *Story on Agency*, 226, 7, where the author seems to think that it may be taken that the party who makes the contract undertakes that he has a principal; but that, he says, would be the subject of a special action.] That point was not taken at the trial. In order to make the agent liable as principal, it is not necessary to import fraud into the case. [*Alderson*, B.—Mr. Justice Story says (b), “There is no doubt of the personal liability of the agent in all cases where he falsely affirms that he has authority, as he does when he signs the instrument as agent of his principal, and knows that he has no authority. But another question has been made, whether he is liable when he supposes that he has authority, and he has none: as, for example, when he misconstrues the instrument conferring authority on him; or where the instrument conferring the authority turns out to be a forgery, and he supposed it to be genuine. In *Polhill v. Walter*, Lord Tenterden, in delivering the opinion of the Court, seems to have thought that the right of action was founded solely upon there being an affirmation of authority, when the party knew it to be false; and that therefore, if the party acted under the authority of a forged instrument, supposing it to be genuine, he would not be responsible. But there is great reason to doubt this doctrine; for if a person represents himself as having autho-

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1842.

SMOOTH
&
LIBERTY.

(a) 3 B. & Ad. 114.

(b) Pages 226, 7, note 3.

Exch. of Pleas,
1842.

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ILBERT.

rity to do an act when he has not, and the other side is drawn into a contract with him, and the contract becomes void for want of such authority, the damage is the same to the party who confided in such representation, whether the party making it acted with a knowledge of its falsity, or not. In short, he undertakes for the truth of his representation." And then he adds, "In cases where a person executes an instrument in the name of another, without authority, there is some diversity of judicial opinion as to the form of action in which the agent is to be made liable for the breach of duty. In England it is held that the suit must be by a special action on the case. *Polhill v. Walter.*" It is not necessary to import fraud into the case, to render the agent liable. If a party says, "I am agent of A. B." he undertakes that he is so. The defendant must be taken to have held out to the plaintiff that she had authority to bind some person; and if that was untrue, she is herself bound. The defendant having accepted the meat supplied to her, and used it, there is a contract implied by law on the part of some person to pay the price of the meat; and as the husband was dead, and she had no authority to bind his executors, a contract must be implied on her part to pay for the meat supplied to her after her husband's death; and she is not to be allowed to get rid of her liability by saying, that at the time she gave the orders or accepted the goods, she thought her husband was alive, and that she was contracting on his behalf. In *Thomson v. Davenport (a)*, where at the time of making a contract of sale, the party buying the goods represented that he was buying them on account of persons resident in *Scotland*, but did not mention their names, and the seller did not inquire who they were, but afterwards debited the party who purchased the goods; it was held that the seller might afterwards sue the principals for the

(a) 9 B. & Cr. 78; 4 Man. & Ry. 110.

price. There the vendor actually credited the agent, and yet the principal was held liable. The general principle is, that the law creates an implied contract from the receipt of the goods. [*Alderson, B.*—Here each party thought the husband was responsible]. That can make no difference, for it is clear that there could be no contract between the plaintiff and the dead man; and there was no contract by the executor with the plaintiff. There is a fallacy on the other side, in assuming that there was a prior continuing contract between the husband and the plaintiff, respecting the supply of goods to the wife. An action for goods sold and delivered is not necessarily founded upon a contract antecedent to the delivery of the goods; it may be, and generally is, founded upon the implied contract that the party will pay the price or value of the goods delivered and accepted by him; and there are as many implied contracts as there are parcels of goods delivered and accepted. If there was no prior contract at all in the present case (which it is clear there was not), then the moment each parcel of goods was delivered and accepted, the law implied a contract by the defendant, who received and accepted them, to pay the price.

Esch. of Pleas,
1842.

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Erie, in support of the rule.—The contract in this case was a continuing contract, which the parties, in *Blades v. Free*, failed to make out. This was a course of dealing which was continued in consequence of, and as part of, the former contract. An agent ought not to be held liable where he enters into a contract as agent, *bonâ fide* supposing himself to have authority, when it turns out that he had none, through an event which had happened, but of which he was not cognizant, and had no means of knowing. The evidence here was, that goods were supplied by the plaintiff to the husband during his residence here, and were afterwards continued to be supplied to his wife after he left this country; there is clearly no implied

Arch. of Pleas,
1842.

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contract arising from this state of things, that she would pay for them. Suppose the case of the husband and wife having both gone abroad, and having left a housekeeper in charge of the house and the children, and 'meat is supplied to the house, and the husband and wife are both drowned, is the housekeeper to be liable, because she ordered the meat for the use of the house? [*Alderson, B.*—In the same way it may be said, if a bachelor leaves a housekeeper in possession of his house, and goes abroad, and dies, is the housekeeper to be liable?] In *Polhill v. Walter*, there was the making of a representation which the party making it knew to be untrue. If Ilbery had not died, he would have been clearly liable, and the account was in his name. As to the argument of there being an implied contract, that merely amounts to this, that a party to whom goods are delivered is liable for them; but that is where there is nothing to shew that any other person was responsible. The case of *Blades v. Free* has nothing to do with the present.

Cur. adv. vult.

The judgment of the Court was now delivered by—

ALDERSON, B.—This case was argued at the Sittings after last Hilary Term, before my brothers *Gurney, Rolfe*, and myself. The facts were shortly these. The defendant was the widow of a Mr. Ilbery, who died abroad; and the plaintiff, during the husband's lifetime, had supplied, and after his death had continued to supply, goods for the use of the family in England. The husband left England for China in March, 1839, and died on the 14th day of October, in that year. The news of his death first arrived in England on the 13th day of March, 1840; and the only question now remaining for the decision of the Court is, whether the defendant was liable for the goods supplied after her husband's death, and before it was possible that

the knowledge of that fact could be communicated to her. There was no doubt that such knowledge was communicated to her as soon as it was possible; and that the defendant had paid into Court sufficient to cover all the goods supplied to the family by the plaintiff subsequently to the 13th March, 1840.

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We took time to consider this question, and to examine the authorities on this subject, which is one of some difficulty. The point, how far an agent is personally liable who, having in fact no authority, professes to bind his principal, has on various occasions been discussed. There is no doubt that in the case of a fraudulent misrepresentation of his authority, with an intention to deceive, the agent would be personally responsible. But independently of this, which is perfectly free from doubt, there seem to be still two other classes of cases, in which an agent who without actual authority makes a contract in the name of his principal, is personally liable, even where no proof of such fraudulent intention can be given. First, where he has no authority, and knows it, but nevertheless makes the contract as having such authority. In that case, on the plainest principles of justice, he is liable. For he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just, that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. But there is a third class, in which the Courts have held, that where a party making the contract as agent *bonâ fide* believes that such authority is vested in him, but has in fact no such authority, he is still personally liable. In these cases, it is true, the agent is not actuated by any fraudulent motives; nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before. It is a wrong, differing only

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in degree, but not in its essence, from the former case, ~~to~~ state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct. And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences.

On examination of the authorities, we are satisfied that all the cases in which the agent has been held personally responsible, will be found to arrange themselves under one or other of these three classes. In all of them it will be found, that he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party, as would enable him equally with himself to judge as to the authority under which he proposed to act.

Of the first, it is not necessary to cite any instance. *Polhill v. Walter* (a) is an instance of the second; and the cases where the agent never had any authority to contract at all, but believed, that he had, as when he acted on a forged warrant of attorney, which he thought to be genuine, and the like, are instances of the third class. To these may be added those cited by Mr. Justice Story, in his book on Agency, p. 226, note 8. The present case seems to us to be distinguishable from all these authorities. Here the agent had in fact full authority originally to contract, and did contract in the name of the principal. There is no ground for saying, that in representing her au-

(a) 3 B. & Ad. 114.

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thority as continuing, she did any wrong whatever. There was no mala fides on her part—no want of due diligence in acquiring knowledge of the revocation—no omission to state any fact within her knowledge relating to it, and the revocation itself was by the act of God. The continuance of the life of the principal was, under these circumstances, a fact equally within the knowledge of both contracting parties. If, then, the true principle derivable from the cases is, that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present. And to this conclusion we have come. We were, in the course of the argument, pressed with the difficulty, that if the defendant be not personally liable, there is no one liable on this contract at all; for *Blades v. Free* (a) has decided, that in such a case the executors of the husband are not liable. This may be so: but we do not think that if it be so, it affords to us a sufficient ground for holding the defendant liable. In the ordinary case of a wife who makes a contract in her husband's lifetime, for which the husband is not liable, the same consequence follows. In that case, as here, no one is liable upon the contract so made.

Our judgment, on the present occasion, is founded on general principles applicable to all agents; but we think it right also to advert to the circumstance, that this is the case of a married woman, whose situation as a contracting party is of a peculiar nature. A person who contracts with an ordinary agent, contracts with one capable of contracting in his own name; but he who contracts with a married woman knows that she is in general incapable of making any contract by which she is personally bound. The contract, therefore, made with the husband by her

(a) 9 B. & Cr. 167; 4 Man. & Ry. 282.

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instrumentality, may be considered as equivalent to one made by the husband exclusively of the agent. Now, if a contract were made on the terms, that the agent, having a determinable authority, bound his principal, but expressly stipulated that he should not be personally liable himself, it seems quite reasonable that, in the absence of all mala fides on the part of the agent, no responsibility should rest upon him: and, as it appears to us, a married woman, situated as the defendant was in this case, may fairly be considered as an agent so stipulating for herself; and on this limited ground, therefore, we think she would not be liable under such circumstances as these.

For these reasons, we are of opinion that the rule for a new trial must be absolute; but as the point was not taken at *Nisi Prius*, we think the costs should abide the event of the new trial.

Rule absolute accordingly.

May 24.

ADKINS v. ANDERSON.

The term "re-joining gratis," means rejoining without a rule for that purpose; and therefore, where a defendant is under those terms, he has still four days from the delivery of the replication in which to re-join; the only effect of that term being to dispense with the necessity of a rule to rejoin.

THE defendant, being under terms of "pleading issuable, *rejoining gratis*, and taking short notice of trial," pleaded a plea of gaming, to which the plaintiff replied *de injuriâ*, added the *similiter*, and, on the 2nd of May, delivered the issue with notice of trial for the 10th. The defendant did not return the issue, but, on the 6th of May, sent the following notice to the plaintiff's attorney:—"Take notice, that I do not receive the issue delivered by you in this cause as such, but consider the same as a replication only. I have therefore struck out the *similiter*

added by you to your replication to the defendant's last plea, and have demurred to your replication."

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Hugh Hill having obtained a rule calling on the defendant to shew cause why the demurrer delivered by him should not be set aside, and why the cause should not be tried pursuant to the notice of trial,—

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S. Hughes shewed cause (May 9).—The question depends on the meaning and effect of the term "rejoining gratis." It is said, that the defendant, being under those terms, was bound to demur within twenty-four hours; but that is not so; the meaning of "rejoining gratis" is, that the party must rejoin within twenty-four hours after delivery of the replication and demand of a rejoinder: *Clark v. Adams* (a). But that rule does not extend to a joinder in demurrer. That was so held in *Jones v. Key* (b), where the Court say, "There is good reason in this; for a party may want time to consider the law before he joins in demurrer, though he can join issue to the country without consideration." That reason applies still more strongly to a demurrer, where much time for deliberation may be required.

Hugh Hill, in support of the rule.—Delivering the issue with the similiter is equivalent to a demand of rejoinder; and the defendant, by keeping the issue four days, must be considered as having accepted it. In *Wye v. Fisher* (c), a plaintiff having tendered an issue to a plea, and demanded a rejoinder, where the plaintiff was under terms to rejoin gratis, and the defendant not having rejoined, the plaintiff signed judgment for want of a rejoinder; the Court held the judgment regular, but set it aside without costs, because the plaintiff might have added the similiter himself. That shews that the plaintiff, in the present case,

(a) 2 Cr. & J. 683; 2 Tyrw. 755. (b) 2 Cr. & M. 340; 4 Tyrw. 238.

(c) 3 Bos. & P. 443.

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adopted the proper course. In *Hutchinson v. Senior (a)*, it was held that the terms of rejoining gratis compelled a defendant to return the issue within twenty-four hours for the purpose of demurring to the replication, if the plaintiff has added the similiter, and delivered the issue.

Cur. adv. vult.

The judgment of the Court was now delivered by—

LORD ABINGER, C. B.—We have consulted the officers of the several Courts on the point raised in this case, and have come to a decision in favour of the defendant. A defendant is always entitled to four days to rejoin, from the delivery of the replication; and the term “rejoining gratis” means only that he will rejoin without putting the plaintiff to the necessity of obtaining a rule to rejoin. The defendant is in the same position, and has the same time to rejoin, as if the replication had been delivered accompanied by a rule to rejoin, in which case he would have had four days. The rule must therefore be discharged; but, as it is a doubtful point of practice, without costs.

Rule discharged, without costs.

(a) Not yet reported, except in the *Jurist*, Vol. 5, p. 387.

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SCHOLES and Another, Executors, v. HILTON.

May 25.

J. HENDERSON had obtained a rule, calling upon Mr. John Topham to shew cause why an attachment should not issue against him, for disobedience to a subpoena requiring his attendance as a witness for the defendant in the above cause. The writ commanded him "to appear before our justices assigned to take the assizes in and for the southern division of the county of Lancaster, at Liverpool, within the same county, on Thursday, the 24th day of March, 1842," to give evidence and produce documents on the trial of this cause. The 24th of March was the commission-day, but the cause was not tried until Monday, the 4th of April, between nine and ten in the morning, at which time Topham was absent, and a verdict passed for the plaintiffs. The affidavit in support of the rule stated, that Topham would have been a material and necessary witness for the defendant, and that, if he had appeared and given evidence, the defendant would have succeeded in the action. It appeared, however, from the affidavit filed in answer to the application, that this was an action of trover for a deed relating to certain leasehold property, which had been mortgaged, in breach of his duty, by Topham, who was the sole trustee under the defendant's marriage settlement, to the plaintiffs' testator; and that the defendant claimed to hold the deed only on the ground of his interest under the settlement. The affidavit further stated, that upon the defendant's counsel stating, at the trial, that he was prepared to prove the above facts by the evidence of Topham, who would produce the draft conveyance, and other documents, *Rolfe, B.*, who tried the cause, at once stated

A subpoena requiring the party to attend the trial of a cause on the commission day of the assizes, extends to the whole assizes, and it need not go on to require his attendance "from day to day until the cause is tried."

Semble, it is not sufficient, in answer to an application for an attachment against a witness for disobedience to a subpoena, to shew that his evidence was not material.

In answer to a motion for an attachment, the witness swore, that he had been for some time in bad health; that on the day before the trial came on, he had been in readiness to attend and give evidence; that on the morning of the trial he was unwell, and did not rise until ten o'clock, and that on going shortly afterwards to his office, which was

in his way to the Court, he found the cause had been tried. The Court discharged the rule.

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that they formed no defence to the action, and directed a verdict for the plaintiffs. Topham's affidavit stated also, that he had been for some time in a very weak state of health; that he had been in readiness to attend the trial on the Saturday preceding, but on the Monday morning, being very unwell, he did not rise until ten o'clock, and on arriving at his office, which was in his way from his residence to the Court, about half-past eleven o'clock, he was informed that the cause had been tried.

Cowling shewed cause.—There is a preliminary objection to this application. The subpoena required Topham's attendance only on the 24th of March, the commission-day, and did not, according to the usual and proper form, go on to require it "from day to day until the cause should be tried." A party will not be brought into contempt, unless his duty have been clearly pointed out by the process which he is charged with having disobeyed. [*Alderson*, B.—The assizes are in law but one day. It is plain it means to require his attendance at the assizes.]

Secondly, it is clear upon the affidavits, that Topham was not a material witness, and that, if he had been in attendance, and given all the evidence which was expected from him, the verdict would have been the same. The first requisite, therefore, to sustain an application of this nature, that the party should have been a material and necessary witness, altogether fails. [Lord *Abinger*, C. B.—That is undoubtedly a necessary part of the case in an action against the witness for damages; but is it so on a motion for an attachment? The witness may equally have been guilty of a contempt of the process of the Court, whether he were a material witness or not.] At all events, such a witness must clearly be shewn to have been guilty of a wilful contempt: *Chapman v. Davis* (a). Now here

(a) 1 Dowl. P. C. (N. S.) 239.

it is sworn that this witness was ready to attend the trial on the Saturday, although in bad health, and that he was ill on the Monday morning.—The Court here called on

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J. Henderson, contra.—It is incumbent on the witness, who failed to attend pursuant to the subpoena, to shew clearly that he was incapable of attending. [*Alderson*, B.—Surely the Court is not to presume a contempt, but rather the contrary.] Here he does not even swear that he intended to attend on the Monday, or that he was proceeding towards the Court for that purpose; nor does he state that he *could* not, but merely that he did not, rise earlier than ten o'clock; and he was able immediately afterwards to attend at his office.

LORD ABINGER, C. B.—We think there is no sufficient ground laid in these affidavits for coming to the conclusion, that the absence of the witness was voluntary in contempt of the process of the Court. That ought to have been clearly shewn, and we cannot presume it. If the defendant had really been prejudiced by the absence of the witness, he might have made it the ground of an application to the Court for a new trial, or have brought his action for damages: but the sole question now is, whether the witness is shewn to have treated the Court with contempt; and we think that all the circumstances shew that he was not guilty of any intentional disrespect.

The other Barons concurred.

Rule refused.

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May 25.

QUESTED v. CALLIS.

The attorney of a defendant has no such interest in the suit as to prevent the parties from compromising it without his consent.

THIS was an action for goods sold and delivered, to which the defendant pleaded, first, *nunquam indebitatus*; and secondly, his discharge under the Insolvent Debtors' Act. To the latter plea the plaintiff replied, that the schedule filed by the defendant in the Insolvent Debtors' Court did not contain a true description of the debt in the declaration mentioned, but falsely described it as amounting to 4*l.* 10*s.*, instead of 11*l.* 16*s.* 6*d.*, whereby, and in consequence of such false description, the defendant was not discharged from the said debt by force of the act. To this replication the defendant demurred, and the plaintiff joined in demurrer: but before the demurrer came on for hearing, the defendant was taken in execution at the suit of another creditor, and again petitioned the Insolvent Debtors' Court for his discharge, and on this occasion inserted the correct amount of the plaintiff's debt in his schedule. The plaintiff's attorney thereupon took out a summons for a stay of proceedings in this action, without costs, which was dismissed, the defendant's attorney undertaking to pay the plaintiff's costs in the event of judgment being given for him on the demurrer. The plaintiff gave notice of opposition to the defendant's case in the Insolvent Debtors' Court, and on his hearing, appeared to oppose him; but in consideration of withdrawing his opposition, the defendant was prevailed upon,—without the concurrence of his attorney, and notwithstanding a notice which the latter had served on the defendant, not to settle the action without his knowledge,—to sign a written consent to a stay of all proceedings without costs: upon which consent, *Gurney, B.*, made an order accordingly.

Figott, on behalf of the defendant's attorney, had obtained

a rule to rescind this order. One of the affidavits on which he moved stated, that the defendant, on the day of his discharge, met the clerk of the defendant's attorney, and said he was sorry for what he had done, and that he should not have signed the consent, if he had not been intimidated by the threats of the plaintiff's attorney.

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Petersdorff now shewed cause against the rule.—This rule raises a question of some novelty; namely, whether the Court will interfere to prevent a *defendant* from settling the action without the consent of his attorney. There are undoubtedly cases in which the Court has afforded such a protection to the attorney of a *plaintiff*, when the parties, by a collusive agreement between themselves, have endeavoured to defeat his claim; but that is upon the ground that a plaintiff's attorney has a *lien* upon the subject matter of the suit for his costs. But a defendant's attorney has no such interest; he has merely a contingent and speculative chance of recovering costs from the plaintiff, in case of his failure; and he can have no privilege to compel a plaintiff against his will to proceed in a suit against an insolvent defendant. Suppose the defendant had pleaded a release, or his second insolvency *puis darrein continuance*, can it be contended that his attorney might still force the plaintiff to go on, because there was a possibility of his obtaining costs on the judgment? On the other hand, is an insolvent defendant to be remanded, because he cannot obtain his attorney's consent to a settlement of the action? The affidavits in this case do not shew any collusion between the parties, but merely a bargain, which they had a right to make, that the litigation between them should be put an end to.

Pigott, contra.—It is not disputed that the parties to an action are at liberty to settle it without the consent of the attorney, unless it be done collusively, with the object of

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May 27. **RAMSEY and others, Assignees of BODEN, a Bankrupt,**
v. EATON.

A creditor on a judgment founded upon a warrant of attorney, issued execution thereon, and seized and sold the goods of the debtor under a fieri facias, without notice of any act of bankruptcy committed by the debtor. On the day after the sale, a fiat in bankruptcy issued against the debtor:—*Held*, that the assignees were not entitled to recover from the creditor the proceeds of the sale, inasmuch as, at the time of the fiat, he was not a creditor of the bankrupt, within the 6 Geo. 4, c. 16, s. 108.

Notice to a sheriff's officer in possession under a fi. fa., of an act of bankruptcy committed by the defendant, is not notice to the execution creditor, within the 2 & 3 Vict. c. 29.

Semble, a general notice to the creditor, that the defendant has committed an act of bankruptcy, is sufficient, without stating the nature of it.

ASSUMPSIT by the plaintiffs, as assignees of J. A. Boden, a bankrupt, for money had and received. Plea, non assumpsit. At the trial before *Parke, B.*, at the last York assizes, it appeared that the bankrupt and his partner, being indebted to the defendant, gave him, on the 21st of April, 1841, a warrant of attorney to secure the payment of the amount then due, 272*l.* 1*s.* 2*d.* On the 22nd of May, judgment was entered up on the warrant of attorney, and a fieri facias issued, under which the goods were seized by the sheriff, and sold on the 28th of May. On the 29th, a fiat in bankruptcy issued against Boden, on an act of bankruptcy committed six weeks before. On the 25th of May, the sheriff's officer, being then in possession of the goods, was served with the following notice:—

“To the High Sheriff of the county of York, and his under-sheriff, and also to Mr. Joseph Naylor Ryalls, his bailiff.

“I do hereby, on behalf of the petitioning creditor, give you notice, that a docket has been struck, and a fiat issued, against John Amory Boden, of &c.; and that, prior to your entering an execution in his house and premises, an act of bankruptcy had been committed by the said John Amory Boden. I do therefore discharge you from selling or disposing of his property.

“*Lake Palfreyman*, solicitor to the petitioning creditor under the fiat.

“Dated this 25th day of May, 1841.”

At the time of the service of this notice, the fiat had

not in fact issued. The sheriff's officer disregarded the notice, and did not communicate to the defendant or his attorney the fact of his having received it, until after the goods had been sold, and the proceeds, amounting to 174*l.* 6*s.* 10*d.*, paid over (on the 1st of June) to the defendant. Upon these facts, it was objected for the defendant, first, that a notice of an act of bankruptcy given to the sheriff or his bailiff was not a sufficient notice to the execution creditor, within the 2 & 3 Vict. c. 29, s. 1; and secondly, that the form of the notice was insufficient, inasmuch as it merely intimated generally that an act of bankruptcy had been committed, but did not state the nature of it. The learned Judge, thinking the first objection fatal, directed a nonsuit, reserving leave to the plaintiffs to move to enter a verdict for such sum as the Court should direct.

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In Easter Term last (April 21),

Erle moved accordingly.—First, the defendant was not protected by the statute 2 & 3 Vict. c. 29, inasmuch as he claims under a judgment and execution founded on a warrant of attorney: he must come in and share rateably with the other creditors, under the 6 Geo. 4, c. 16, s. 108. In *Whitmore v. Robertson* (a), this Court expressly held that that section was not repealed or altered by the stat. 2 & 3 Vict. c. 29. Here the assignees claim the proceeds of the goods on the ground that the defendant was a creditor of the bankrupt at the time of the bankruptcy, and he is therefore within the positive enactment of the 6 Geo. 4, c. 16, s. 108. On this point he cited *Wymer v. Kemble* (b), *Notley v. Buck* (c), and *Godson v. Sanctuary* (d).

Secondly, the notice was sufficient. The sheriff, or his officer in possession of the goods under the execution, is, for this purpose, the agent of the execution creditor.

(a) 8 M. & W. 463.

(c) 8 B. & Cr. 160; 2 Man. & R. 68.

(b) 6 B. & Cr. 479; 9 D. & R.

(d) 4 B. & Adol. 255; 1 Nev. & M. 52.

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PARKE, B.—As to the first point, I think the view I took of the case at the trial was right. There is a material distinction between this case and that of *Whitmore v. Robertson*. There the fiat issued after the levy, but before the sale; here the fiat did not issue until after the sale. Here, therefore, at the time of the issuing of the fiat, the defendant was not a creditor of the bankrupt, but of the sheriff. The effect of the stat. 2 & 3 Vict. c. 29, is to wipe out the act of bankruptcy altogether, except where the creditor has notice of it; and to substitute the fiat for it in all cases where the creditor has no notice of it. On this point, therefore, there will be no rule; but the plaintiffs may have a rule on the question as to the sufficiency of the notice (a).

ALDERSON, B.—I quite concur in the view taken by my brother Parke. After the sale, the party is no longer a creditor of the bankrupt, and therefore is not within the 108th section. Then how can full effect be given to the 81st and 108th sections of the act? As it was given in *Whitmore v. Robertson*; by striking out the act of bankruptcy, and substituting the fiat. Therefore, as the defendant ceased to be a creditor before the issuing of the fiat, he is not within the 108th section.

ROLFE, B.—I am of the same opinion. The proviso in s. 108 applies only to creditors of the bankrupt; now by the seizure and sale, this defendant had ceased to be a creditor of the bankrupt.

Wortley and Pashley now appeared to shew cause against

(a) The rule was mainly granted on the ground that in another case of *Lawson v. Holloway*, tried before Coleridge, J., at Winchester, that learned Judge had ruled at Nisi Prius that notice to the she-

riff's officer in possession was sufficient, reserving the point for the consideration of this Court. A rule for a nonsuit was accordingly granted, and on this day was made absolute.

the rule granted on the other point, but the Court called
on

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Erle and Baines, contra.—It never could have been the intention of the legislature, in passing the stat. 2 & 3 Vict. c. 29, to permit an execution to go on, where it was clear to demonstration to the party levying it, that the debtor had become a bankrupt. The obvious intention of the statute was to stop all the proceedings, after notice of an act of bankruptcy should be served upon the party intrusted with the conduct of a suit, or under whose direction the law was put in motion. It could not have been meant that the sheriff must sell, unless notice could be brought home to the creditor personally. In many cases it might be impossible to find him; as where he is resident abroad: and the reason and convenience of the case require, that notice to a party, who is an agent for the purposes of the execution, should be notice to the principal. [Lord *Abinger*, C. B.—Suppose that be granted, how can it be said that the sheriff's officer is the agent of the creditor?] The creditor sets him in motion. [*Alderson*, B.—No; the creditor applies to the Court, and the Court orders its officer to execute the writ.] Though, in one point of view, the sheriff is an officer of the Court, in another he is the agent of the execution plaintiff. If the writ be void, the latter is liable for the acts of the sheriff as his agent, and an action for money had and received may be brought against him for the sum levied: *Hitchin v. Campbell* (a). So, if the sheriff withholds the money which he has levied, the creditor may bring an action of contract against him, without the intervention of the Court. [*Parke*, B.—According to your argument, if the sheriff had received the proceeds, and had not paid them over, the execution creditor would nevertheless have been

(a) 2 W. Bl. 827; 3 Wils. 304.

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liable in this action. If the sheriff were the agent of the party, the receipt by him would be a receipt by the party also.] The giving a receipt is beyond the scope of his authority as agent. The sheriff may recover his poundage from the creditor; *Stanton v. Sullard* (a); and it is every day's practice for the creditor to control the sheriff by special directions accompanying the writ, and to indemnify him for executing it; and when the plaintiff appoints his own special bailiff, the sheriff still acts. If notice to the bailiff be held insufficient, it is obvious that, in a great number of cases, it will be impossible to affect the judgment creditor with notice at all: the only person that can immediately and certainly be found, representing him, is the bailiff in possession.

As to the form of the notice, it was quite sufficient to warn the party that an act of bankruptcy had been committed, without specifying the nature of it. All that is necessary is to put the sheriff on his guard, and enable him to apply under the Interpleader Act. So, it would be sufficient, if it must be given to the creditor, as it discloses enough to put him on inquiry.—On this point they cited *King v. Leith* (b), and *Spratt v. Hobhouse* (c).

LORD ABINGER, C. B.—There is nothing whatever in this case. A notice to the bailiff is no notice to the execution creditor; the bailiff cannot be considered as his agent.

PARKE, B.—The words of the stat. 2 & 3 Vict. c. 29, afford a complete answer to the argument on the part of the assignees. The proviso runs thus:—"Provided that *the person at whose suit* such execution shall have issued, had not, at the time of executing or levying such execution or attach-

(a) Cro. Eliz. 654.

(b) 2 T. R. 141.

(c) 4 Bing. 173; 12 Moore, 395.

ment, notice of any prior act of bankruptcy." Unless, therefore, the sheriff can be considered the agent of the party for such a purpose, notice to him, or to his bailiff, cannot avoid the execution. But he cannot be so considered; the sheriff is the officer of the Court, and bound to obey the writ, and is not, in point of law, the agent of the party who sues it out. If the legislature had intended that notice to the sheriff or his bailiff should have the same effect as a notice to the party suing out the execution, they should have expressed themselves plainly; as it is, we can only construe the words they have used as we find them; and it is impossible here to say that the execution creditor had either notice, knowledge, or means of knowledge, of the act of bankruptcy. As to the form of the notice, probably it would be a sufficient notice within the meaning of the statute, if it had been communicated to the creditor, as it would intimate to him that an act of bankruptcy had been committed, which would be sufficient to put him on his guard, and call upon him to make inquiry. It is unnecessary, however, to decide that point at present, as we can only regard the sheriff as the officer of the Court, and not the agent of the party.

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ALDERSON, B., and ROLFE, B., concurred.

Rule refused.

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May 24.

Where an attorney has been guilty of misconduct in the course of a cause, the Court will grant a rule calling on him to shew cause why his name should not be struck off the roll, even although the matter complained of may amount to an indictable offence; but the Court will not, under such circumstances, call upon him to answer the matters of an affidavit.

The affidavits to ground an application to strike an attorney off the roll for misconduct in a cause, may be intitled in the cause, though judgment has been obtained in it.

STEPHENS v. HILL.

LUDLOW, Serjt., in Easter Term, obtained a rule calling upon the defendant's attorney in this cause to shew cause why he should not be struck off the roll of attornies, or be prohibited from practising in this Court. It appeared from the affidavits in support of the application, that the action was for the breach of a warranty of the soundness of a horse, and the defendant, by his pleas, denied both the warranty and the unsoundness. The evidence of the warranty consisted of two letters, addressed by the defendant to the plaintiff, which the defendant's attorney, on the usual notice and summons being served on him, refused to admit. In order to prove that the letters were in the defendant's handwriting, a person named Jackson, an intimate friend of the defendant, was subpoenaed, and he informed the defendant and his attorney of the circumstance, who both endeavoured to persuade him, by threats and promises, not to prove the handwriting. The defendant's attorney subpoenaed two persons of the names of Cook and Cooper, who resided in the same village with Jackson, in Yorkshire, and on the road from thence to Gloucester, where the cause was to be tried, a conversation took place between them and the defendant's attorney, as to the possibility of getting Jackson out of the way, the defendant's attorney saying that Cook was the only person who had sufficient influence over him for that purpose. Both Cook and Cooper, after their arrival at Gloucester, urged Jackson to leave the place, and the defendant's attorney offered him anything to do so, stating that his evidence was the only thing he feared. On the evening previous to the trial of the cause, Cooper went to the inn where the plaintiff's witnesses were staying, and, under the pretence of taking a walk, brought Jackson to the house where the defendant's attorney and Cook lodged.

The defendant's attorney and Cook then united in urging Jackson to leave Gloucester on the following morning early, and, after much persuasion, he at length consented. It was then arranged that Cook should start with him to Birmingham, there to await the arrival of the defendant's attorney, and, upon Cook's representation that he would not be instrumental in procuring Jackson's departure, unless the attorney indemnified the latter from the consequences that might result from his absence, the defendant's attorney gave Jackson the following guarantee:

"I hereby undertake to indemnify Mr. John Jackson for any damage he may sustain or be put to, by reason of his going away from Gloucester, as he is not a material witness in the case *Stephens v. Hill*. Dated this 6th of August, 1841.

"John Whitehead,

"Solicitor for defendant.

"Witness, Thomas Cook."

Cook and Jackson accordingly went to Birmingham early the following morning. The plaintiff's attorney having, before the cause was called on, discovered that Jackson was gone, charged the defendant's attorney with having sent him off, and threatened to call him as a witness to prove the defendant's handwriting, and at the same time served him with a subpoena. The plaintiff's counsel, in opening the case to the jury, commented in strong language upon the conduct of the defendant's attorney, declaring his intention to examine him as to the handwriting, whereupon the defendant's counsel said he was instructed to admit that the letters were written by the defendant's authority, but to deny they were in his handwriting. The plaintiff thereupon obtained a verdict.

The affidavits on which this application was founded being intitled in the cause *Stephens v. Hill*,

Wortley and Keating, on shewing cause, took a prelimi-

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nary objection that the affidavits were improperly intitled; that judgment having been long since given in the cause, the Court was functus officio with respect to it, there being no such cause in the Court; and that, the application not being a matter affecting the cause, or the parties, but directed personally against the attorney, they ought to have been intitled "in the matter of &c." [*Alderson*, B.—It relates to the conduct of the cause. Because judgment has been given, it is not therefore out of Court. The affidavits are properly intitled.]

Then, as to the merits of the application, the Court will not exercise its summary jurisdiction over an attorney, where the misconduct charged amounts to an indictable offence. The charge here made, if true, amounts to a conspiracy, for which the attorney may be indicted; and if he be indicted, the judgment of the Court on this application might prejudice him on his trial. The complainant ought to resort in the first instance to his remedy by indictment, and if the attorney were convicted, the Court might then properly interfere. [Lord *Abinger*, C. B.—The Court will not grant a rule calling upon the attorney to answer the matters of the affidavit in such a case, but they will grant a rule to shew cause why he should not be struck off the roll.] Although the Court will not call upon the attorney to answer the matters of the affidavit, yet if he does not do so the consequence would be that he would be struck off the roll. Such a distinction has never been recognised, and the position contended for was acted upon by the Court of Queen's Bench yesterday in the case of *Ex parte Cain, in Harding v. Lee* (a). The Court there decided that, inasmuch as a portion of the charge would not affect the attorney in an indictable manner, they would enter into that; but said that had it been otherwise they would not have done so. [*Alderson*,

(a) Not yet reported.

B.—Then, according to the rule now contended for, the more serious the offence of the attorney, the longer he is to remain on the roll; he is to be left on the roll because he sets up that he has been guilty of an indictable offence? No; but where the charge is indictable, it is incumbent on the Court not to prejudice the case upon affidavit. [*Alderson*, B.—Suppose nobody prosecutes?] If the Court punish the attorney summarily, the probability of there being no prosecution is increased, which is against public policy. The defendant's attorney is not an attorney of this Court.

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Ludlow, Serjt., in support of the rule, was stopped by the Court.

LORD ABINGER, C. B.—I never understood that an attorney might not be struck off the roll for misconduct in a cause in which he was the attorney, merely because the offence imputed to him was of such a nature that he might have been indicted for it. So long as I have known Westminster Hall, I never heard of such a rule as that; but in the case of applications calling upon an attorney to answer the matters of an affidavit, I have known Lord *Kenyon* and also Lord *Ellenborough* frequently say, you cannot have a rule for that purpose, because the misconduct you impute to the man is indictable; but you may have one to strike him off the roll. Now an attorney who has been guilty of cheating his client, or the opposite party, in such a manner as to render himself indictable, is unfit to be allowed to remain on the roll, or to practise in any court; and I see no objection, on principle, to the Court's removing him at once from it. If, indeed, he were called on to answer the matters of an affidavit, he would, by not complying, be guilty of a contempt for which he might be punished by attachment, and if the offence imputed to him were of an indictable nature, it would be most unjust to

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compel him to do so ; for which reason a rule to answer the matters of an affidavit is never granted in such a case, but only a rule to strike him off the roll, which gives him a full opportunity of clearing himself from the imputation, if he can, while, on the other hand, it does not compel him to criminate himself. There was a case in the Court of Queen's Bench (*a*), where a motion of this nature was made by Sir *John Campbell*, and in which Lord *Denman* states the distinction between applications to answer the matters of an affidavit and to strike off the roll, in the same manner I am now doing ; although, unless that case is looked at with attention, it might be taken to go further, and be considered an authority against this rule : and the precise nature of the case and ground of the motion are not given in the report. If, indeed, a case should occur where an attorney has been guilty of some professional misconduct for which the Court by its summary jurisdiction might compel him to do justice, and at the same time has been guilty of something indictable in itself, but not arising out of the cause, the Court would not inquire into that with a view of striking him off the roll, but would leave the party aggrieved to his remedy by a criminal prosecution. I believe the first case to be found of proceedings taken by the Court against an attorney for something done by him in the way of his profession, is to be found in a case in *Strange's Reports* (*b*), where an attorney having received some deeds in his professional capacity, the Court of Queen's Bench ordered him to re-deliver the deeds to the parties entitled to them, saying that they would oblige all attorneys to perform any trust which might be reposed in them in virtue of the confidence which the character of attorney produced in the mind of the client. Ever since that time, applications of a similar nature have been very

(*a*) Referring to an anonymous case, 5 B. & Ad. 1088.

(*b*) *Strong v. Howe*, 1 Stra. 621.

common in all cases where an attorney in his professional capacity has received money, for which, although he might be made accountable in a civil action, the Court will compel him to do summary justice, without putting the client to the necessity of bringing one. But in all cases where an attorney abuses the process of the Court of which he is an officer, and his proceedings are of such a nature as tend to defeat justice in the very cause in which he is engaged professionally, I never heard that, because by possibility he may thereby have exposed himself to be indicted as a cheat or for a conspiracy, he is to be permitted to remain on the roll; and if the cases in the Queen's Bench be carefully examined, it will be found that no such rule exists. Such a rule would be extremely injurious; for in no case could any remedy be had against the attorney, unless the client would first prosecute him to conviction, until which time he could not be struck off the roll or prevented from practising. Where, indeed, the attorney is indicted for some matter not connected with the practice of his profession of an attorney, that also is a ground for striking him off the roll, although in that case it cannot be done until after conviction by a jury. Now, with respect to the merits of the case before us, I cannot conceive how any attorney employed to prosecute or defend a suit in a court of justice can be justified in using any influence, directly or indirectly, for the purpose of preventing a witness who has been subpoenaed by his adversary from coming forward to give evidence. The present charge is therefore one of a very serious nature, as the proceeding complained of would, if unchecked, be an easy way for any attorney to win his causes; and is it to be said that no remedy can be had unless he is first indicted, and that the Court has no power at once to strike him off the roll? If an indictment is to be first preferred, the point at issue in it might, from its very nature, be one of which a jury would not be the best judges, and more proper to be determined by the Court, who are always the

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fittest tribunal to decide on complaints of technical misconduct, and to determine not only the degree of severity which ought to be resorted to, but the proper cases for the exercise of that mercy which they are ever ready to extend where they see just grounds for it. Now, what is the present case? The attorney goes down to the assizes where his client's cause has been put down in the list for trial on a certain day, on which he gives an indemnity to a witness relied upon by the opposite party to prove some matter in the cause, to save him harmless if he will disobey the writ of subpoena, and absent himself. I do not go into the question of conspiracy which has been raised in this case; I treat it as if the indemnity were given to the witness by the attorney himself alone—an indemnity which he himself admits to be in his handwriting. As, however, the man is not an attorney of this Court, all we can do is to prohibit his practising here until the pleasure of the Court in which he was admitted shall be known; and that branch of this rule must therefore be made absolute.

ALDERSON, B.—The question in this case is, whether the attorney has so misconducted himself in his character of an attorney, as to be an unfit person to remain upon the roll. I am by no means persuaded that the letters were not in the handwriting of the defendant: but even if they were not, and the testimony of Jackson was immaterial, the defendant's attorney had no right to say who was or who was not a material witness for the plaintiff. If such a pretext were admitted, it would be very easy for an attorney to frame an excuse for sending away his opponent's witnesses, and afford a ready recipe for obtaining a verdict. To procure the absence of any witness is gross misconduct in the course of a cause; and whether he may be indicted or not, in my mind, makes no difference. If persons are to be accredited by the Court, it is our duty to watch over and control their conduct; and where a man behaves in

such a way as this person has done, he ought to be no longer accredited.

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GURNEY, B.—There is a manifest distinction between a rule to answer the matters of an affidavit, and to strike an attorney off the roll. The Court will not punish a man by imprisonment because he refuses to criminate himself. The rule here is in the proper form.

ROLFE, B.—Unless there is some positive rule to prevent the Court from interfering in such a case as this, it is our imperative duty to do so. The question therefore is, whether there is any authority to shew that we are precluded from entertaining this application, because the offence is indictable. Upon that point I at first entertained some doubt. It is observable, however, that the simple act complained of is the sending of the witness away; and this is rendered indictable, simply in consequence of its having been done in concert with other persons. We need not, therefore, necessarily deal with that portion of the charge which is indictable; but even were we compelled to do so, I agree in the distinction which has been taken, and think we might entertain this motion. The only authority I have been able to find is a case in Cowper (a), in which Lord *Manfield* observes, “that having been convicted of felony, we think the defendant is not a fit person to be an attorney.” There the defendant had been convicted of stealing a guinea, from which it is evident that it was not an act connected with his character of an attorney, but something perfectly collateral to it. If the Court will interfere in such a case, *à fortiori* they will do so in a case where the misconduct imputed is committed in the conduct of a cause.

Rule absolute, to prohibit the attorney from practising in this Court.

(a) *Ex parte Bronnsall*, Cowp. 829.

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May 25. RAWDON and Another, Assignees of Woodhouse, a Bankrupt,
v. WENTWORTH, Esq., and SYKES.

In trover by assignees of a bankrupt against the sheriff, the latter justified under a judgment recovered in this Court, a fieri facias issued thereon, and a seizure before the fiat. The plea also stated a sale of the goods, but without averring that it was before the fiat, and alleged that at the time of the seizure, S., the execution creditor, had no notice of any prior act of bankruptcy. The replication stated, that, before the judgment was recovered, the bankrupt made his warrant of attorney, authorizing certain attornies to appear for him and receive a declaration in debt at the suit of S., and thereupon to confess

such action, or else to suffer judgment by nil dicit, or otherwise, to pass against him in such action, to be forthwith entered up against him of record; it then averred that the judgment in the plea mentioned was had and obtained on the said warrant of attorney, and that it was given by way of fraudulent preference. The rejoinder only denied that the warrant of attorney was given by way of fraudulent preference; and the jury found this issue for the defendants:—*Held*, that the plaintiffs were entitled to judgment non obstante veredicto, it being admitted on the record that the judgment was obtained on the warrant of attorney, which would only authorize a judgment by confession, nil dicit, or other default, and therefore that the case was within the 6 Geo. 4, c. 16, s. 108, and the execution was not protected by the 2 & 3 Vict. c. 29.

TROVER by the assigness of John Woodhouse, a bankrupt. The defendants pleaded, first, that the plaintiffs were not assignees according to the statutes in force concerning bankrupts, in manner and form, &c.; secondly, that the plaintiffs were not lawfully possessed of the goods and chattels in the declaration mentioned, in manner and form, &c.; thirdly, not guilty; and fourthly, a plea setting forth a judgment recovered against the bankrupt Woodhouse by the defendant Sykes, in an action of debt in this Court, on the 10th March, 1841, a fieri facias thereon, directed to the sheriff of Yorkshire, indorsed to levy £181 for debt, &c., and the delivery thereof to the defendant Wentworth, as sheriff of Yorkshire: by virtue of which writ of execution, the defendant Wentworth, so being such sheriff, and the other defendant Sykes as his servant and by his command, afterwards, and before the date and issuing of the fiat in bankruptcy against the said John Woodhouse, bonâ fide, to wit, on the 29th March, 1841, seized the said goods and chattels in the declaration mentioned, they then being the goods and chattels of the said bankrupt John Woodhouse; and afterwards, to wit, on the same day and year aforesaid, the said defendant the sheriff as such, and the said other defendant as his servant and by his command, duly sold the said goods and chattels towards

satisfaction of the said debt and damages. And the defendants further say, that the said defendant Joseph Sykes, being the person at whose suit and on whose account the said execution issued, had not, at the time of the executing and levying such execution as aforesaid, notice of any prior act of bankruptcy by the said bankrupt committed. And the defendants further say, that the said John Woodhouse, before the said seizure and sale, had delivered the said goods and chattels to the plaintiffs; and although they were possessed thereof at the time of the said seizure, no property therein ever passed to them. And the defendants further say, that the said seizure and sale herein above mentioned was and is the said conversion and disposal in the declaration mentioned, and not other or different.—Verification.

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The plaintiffs joined issue on the first, second, and third pleas; and replied to the fourth, that before the judgment in that plea mentioned was recovered against the said John Woodhouse, to wit, on the 13th March, 1841, the said John Woodhouse made and executed a certain warrant of attorney, bearing date the day and year last aforesaid, and directed and addressed to &c., and thereby, amongst other things, authorized and desired them, the attornies therein named, or any one of them, or any other attorney of the same Court of Exchequer, to appear for him the said John Woodhouse, and to receive a declaration for him in an action of debt for £362, for money borrowed at the suit of the said Joseph Sykes, and thereupon to confess the same action, or else to suffer a judgment by nil dicit or otherwise to pass against the said John Woodhouse in the same action, to be forthwith entered up against him of record of the said Court, for the said £362, besides costs of suit, as by the said warrant of attorney remaining of record in the said Court, before the Barons of her Majesty's said Exchequer, reference being thereunto had, will more fully appear. And the plaintiffs further say, that the said

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judgment in the said plea mentioned, and therein alleged to have been recovered by the said Joseph Sykes against the said John Woodhouse, was had and obtained on the said warrant of attorney, and that the said warrant of attorney, just before the recovering of the said judgment, to wit, on &c., was given by the said John Woodhouse to the said Joseph Sykes, by way of a fraudulent preference of the said Joseph Sykes.—Verification.

Rejoinder, that the said warrant of attorney in the replication mentioned was not given by the said John Woodhouse to the said Joseph Sykes by way of a fraudulent preference of the said Joseph Sykes, in manner and form, &c.; on which issue was joined.

At the trial before *Wightman*, J., at the Summer Assizes for Yorkshire, 1841, a verdict was found for the defendants on the fourth issue, and for the plaintiffs on the other issues.

In the following Michaelmas Term, *Cresswell* obtained a rule nisi for judgment for the plaintiffs, non obstante veredicto, on the fourth issue, on the ground that the execution mentioned in the plea being admitted by the rejoinder to be founded on a warrant of attorney, and the sale not being alleged to have been antecedent to the issuing of the fiat, the defendants were not protected by the 2 & 3 Vict. c. 29: *Whitmore v. Robertson* (a). At the sittings in Michaelmas vacation (Dec. 2),

Dundas and *Addison* shewed cause.—The authority of *Whitmore v. Robertson* is not now disputed. But in order to bring the case within the 108th section of the 6 Geo. 4, c. 16, and to prevent the application of the 2 & 3 Vict. c. 29, it must appear to have been a judgment obtained “by default, confession, or nil dicit.” Now here the plea merely states a judgment recovered, without saying in what

(a) 8 M. & W. 463.

manner; and the replication only adds the fact that it was a judgment on a warrant of attorney. That may have been a judgment *on demurrer*; a party may enter up a judgment on a warrant of attorney in that form. [*Alderson*, B.—The words “or otherwise” surely must mean otherwise *by default*. The party is to *suffer* a judgment to pass by *nil dicit* or otherwise.] He might suffer a judgment to pass on demurrer, and such a judgment could not have been set aside as not being justified by the warrant of attorney. If that be so, the plaintiffs cannot have judgment *non obstante veredicto*, which cannot be entered unless it be clear that upon the pleadings there can be no defence to the action on the merits: *Tidd*, Pr. 922 (9th edit.) The concluding allegation of the plea, that the bankrupt had delivered the goods to the plaintiffs, &c., makes no difference; it is introduced merely by way of giving colour, and cannot be taken to contradict the fact that the seizure was anterior to the fiat.

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Cresswell, *W. H. Watson*, and *Hugh Hill*, *contra*.—This case falls entirely within the authority of *Whitmore v. Robertson*. The plaintiffs must take the colour which is given to them. And how can a party suffer a judgment on receipt of a declaration, except by default? The agreement in the warrant of attorney imports no further proceeding than the delivery of a declaration, and judgment thereon. The real distinction is, whether it be a judgment in a hostile action, or by consent between the parties. The term “suffer judgment” means that the party shall do nothing to resist it, and take no step after declaration.

Cur. adv. vult.

The judgment of the Court was now pronounced by

ALDERSON, B.—The only question on which we reserved

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our judgment in this case, which was argued before my brothers *Gurney* and *Rolfe*, and myself, was, whether we ought to direct judgment to be entered for the plaintiffs, notwithstanding the verdict found for the defendants on the issue arising out of the fourth plea.

By the fourth plea, the defendants justified under a judgment recovered on the 10th March, 1841, in the Court of Exchequer, a writ of *fieri facias* issued thereon, and a seizure before the fiat in bankruptcy on which the plaintiffs' title depends. The plea also stated a sale of the goods seized, without adding an averment that the sale was anterior to the fiat: but averred, that, at the time of the seizure under the writ of *fieri facias*, Sykes, the execution creditor, had no notice of any prior act of bankruptcy.

The replication to this plea stated, that before the said judgment was recovered, the execution debtor made his warrant of attorney, authorizing certain attorneys to appear for him, and to receive a declaration in debt at the suit of Sykes, and thereupon to confess such action, or else to suffer judgment by *nil dicit*, or otherwise, to pass against him in such action, to be thereupon forthwith entered against him of record; and it then averred, that the judgment in the plea mentioned was had and obtained on the said warrant of attorney. It also averred, that the warrant of attorney was given by way of fraudulent preference.

The rejoinder only denied that the warrant of attorney was so given by way of fraudulent preference; and this issue has been found for the defendants.

Upon consideration of these pleadings, and of the facts now admitted on the record, we think the plaintiffs are entitled to the judgment of the Court.

This Court, in the late case of *Whitmore v. Robertson*, has decided (and we see no ground to doubt the correctness of that decision) that an execution levied by seizure before the fiat, where the sale is not prior to the fiat, is

not, if it be a judgment under a warrant of attorney, any answer to the claim of the assignees. Now here the plea states a judgment recovered, and an execution levied by seizure prior to the fiat, and without notice of any prior act of bankruptcy; but it does not aver the sale to have taken place before the issuing of the fiat. The replication then adds the facts of the execution of the warrant of attorney, and that the judgment was obtained on it. All these facts are now admitted on the pleadings. It was contended on the argument, that in order to bring the case within the authority of *Whitmore v. Robertson*, the replication ought, as in the pleadings in that case, to shew distinctly that the judgment was a judgment within the 108th section of the 6 Geo. 4, c. 16. The proviso in the statute extends only to judgments by default, confession, or nil dicit. But here it is averred in the replication, that the judgment was had and obtained on the warrant of attorney previously stated; and the authority given by that warrant of attorney is confined to confessing such action, and to suffering judgment to pass against the defendants by nil dicit, or otherwise, which, in our opinion, would only authorize a judgment by confession, or by nil dicit, or by some other default. The averment, therefore, that the judgment was recovered on such warrant of attorney, is, we think, equivalent to an averment that it was signed in some of the ways authorized by that warrant, and this must be either by confession, by nil dicit, or default. The replication, therefore, does bring the case within the proviso contained in the 6 Geo. 4, c. 16, s. 108; and the case must follow the decision in *Whitmore v. Robertson*.

For these reasons, we think there must be judgment for the plaintiffs non obstante veredicto on the issue arising out of the fourth plea. The other issues have been already found for the plaintiffs.

Judgment for the plaintiffs.

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HARDING v. HALL and Others.

The sequestrator of a benefice, appointed by the bishop under a writ of sequestrari facias, is the mere bailiff or agent of the bishop, and has no such interest in the profits as will enable him to maintain an action at law against a party who wrongfully receives them.

DEBT for money had and received, for interest, and on an account stated. Pleas—nunquam indebitatus, set-off, and payment. At the trial, before *Parke*, B., at the last York Assizes, it appeared that the action was brought against the defendants as the assignees of Francis Iveson, who had been appointed by the Archbishop of York, in the year 1833, sequestrator of the rectory of Lockington, in that county, in respect of two judgment debts due to him from the incumbent, the Rev. Francis Lundy, amounting to £4500. Iveson appointed one Cornelius Collett receiver of the rents and profits: in 1834 Iveson became bankrupt, and the defendants were appointed his assignees; and Collett had since paid over to them the entire fruits of the benefice. In December, 1836, Mr. Lundy entered into a deed of composition with his creditors, whereby the plaintiff and two other persons were named as trustees for the benefit of themselves and the other creditors, Lundy agreeing to allow judgment to be signed against him in this Court for £1500, besides damages and costs, and they agreeing not to issue execution against his person. Judgment was entered up accordingly, and a second writ of sequestrari facias issued thereon, under which the plaintiff was, on the 9th January, 1839, appointed sequestrator of the same rectory of Lockington. This sequestration was duly published on the 13th January; and on the 13th February notice thereof was served on the defendants and Collett, and that they were discharged from further receiving the profits of the rectory under Iveson's sequestration. Iveson died on the 3rd March, 1840. This action was brought to recover from the defendants the sum of 1690*l.* 12*s.* 2*d.*, consisting of the amount received by them from the profits of the rectory since the 13th January, 1839, and also of an alleged excess beyond the amount of the debts due to Iveson.

son, previously received on his account. On these facts, it was objected for the defendants that the action could not be maintained, on the ground that the sequestrator is, in point of law, no more than a kind of bailiff, and therefore not entitled to sue in his own name for the profits of the sequestered benefice: and the learned Judge, being of that opinion, nonsuited the plaintiff, but gave him leave to move to enter a verdict for such sum as an arbitrator should find to be due, in case the Court should be of a contrary opinion.

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In Easter Term, *Baines* obtained a rule nisi accordingly, against which

Dundas and *Crompton* now shewed cause.—Two questions arise in this case: first, whether a sequestrator can maintain such an action as this at all; secondly, whether he can, at all events, maintain it while a former writ of sequestration is pending. The plaintiff cannot, on this record, assert a title as judgment creditor, because he was such conjointly with two other persons. Now, in support of his right to maintain this action, the plaintiff relies on the clause in the writ of sequestration, whereby the bishop gives to the sequestrator “full power and authority, by all lawful ways and means, to publish this our sequestration, and by virtue thereof to levy, ask, *sue for*, *recover*, and receive into his hands and possession, all and singular the said rents, tithes, oblations and obventions, fruits, issues, and profits.” But that is no more than an authority to him to do these acts as the servant or bailiff of the bishop, who, in law, under the original writ of *sequestrari facias*, himself takes possession. The power to “*sue for*” the rents, &c., is to sue in the name of the party interested, or of the bishop, not in his own name. The provision contained in the writ for payment of the charges and disbursements of the cure, and for the retention of the re-

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mainder of the profits "*for yourself*," is also relied on: but it is evident from the concluding clause, which provides that the sequestrator shall render to the bishop "a true and just account of what he shall receive in this behalf during the sequestration, and until the same shall be released," that for all these matters he is to be accountable to the bishop, whose bailiff he is. Accordingly, he may be dismissed, and required to render his accounts at a moment's notice. This appears from the form of a relaxation given in Gibson's Codex, vol. 2, p. 1497. The bishop, under a writ of sequestrari facias, is only an ecclesiastical sheriff, and the sequestrator is his steward or bailiff.—The Court then called on

Baines, Addison, and J. Henderson, in support of the rule.—There is a great difference between the character of a sequestrator and that of an ordinary bailiff, who is merely to receive the profits and hand them over to his principal. A sequestrator has, as well at common law as by statute, a much more extensive authority. He has an *interest* coupled with his agency. He is personally bound to provide for the charges on the living, for repairs and other outgoings of a similar nature: *Whinfield v. Watkins* (a); and also, by the express provisions of the stat. 1 & 2 Vict. c. 106, for payment of the curate's stipend. For these purposes he must be invested with far greater powers to raise the necessary funds than an ordinary bailiff. These duties and liabilities create in him an interest in his character of sequestrator, sufficient to entitle him to maintain this action, independently of his own personal interest to receive the residue to his own use. An administrator for limited purposes, who stands very much in the same position as a sequestrator, was formerly considered as a mere bailiff, and therefore not entitled to sue in his own name;

(a) 2 Phillim. 1.

but it is now held that he may do so: *Williams on Executors*, 310. He is a party filling a mere fiduciary character, and not having the power, in some cases, even of distributing the assets; yet his interest is considered sufficient for the purpose of suing debtors to the estate. And the general rule of law is, that wherever liabilities or active duties are imposed upon a party in any particular character, the Courts invest him with the necessary means of guarding himself against those liabilities, and performing those duties. Thus, churchwardens, who are authorized to distribute, may sue their predecessors: *Astle v. Thomas* (a); so may surveyors of highways: *Heudebourck v. Langton* (b); so, an auctioneer, who is known to be the mere agent of the vendor, may sue a buyer for the price of the goods sold, because he has an interest coupled with his agency. [*Parke, B.*—It is rather because he is the person who makes the contract.] In *Williams v. Millington* (c), the Court put it on the ground of his having an interest. In *Pack v. Tarpley* (d), Lord Denman, C. J., lays it down that a sequestrator may let the lands. That is a power which is not possessed by a bailiff; *Bac. Abr.*, Bailiff; and for such a purpose he must have an interest. [*Alderson, B.*—Can he let the land in his own name? The rector has an interest notwithstanding the sequestration: *Walwyn v. Awberry* (e).] If he cannot let in his own name, but is obliged to use the incumbent's, how can he insure the receipt of the rents for the purpose of the sequestration? [*Alderson, B.*—The Ecclesiastical Court will prevent the incumbent from interfering. The situation of the sequestrator is like that of a receiver in Chancery. *Rolfe, B.*—In the case of a receiver, all that the Court will do is to prevent any party in the cause from interfering.] He has greater power than a mere ordinary receiver; he is also

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(a) 2 B. & Cr. 271; 3 D. & R. 492. (d) 9 Ad. & E. 468; 1 P. & D. 478.

(b) 10 B. & Cr. 546.

(e) 1 Mod. 258.

(c) 1 H. Bl. 81.

Exch. of Pleas, a *bursar*, and is to make distribution of the funds. In 1842. *Calder v. Ross* (a), it seems to have been considered that such a clause in the sequestration would give the receiver authority to act as the owner of the estate would. [*Parke, B.*—That case went on a mere speculation as to what was the law in Scotland, and the powers with which the party was invested by it.] A bishop's sequestrator has been admitted to sue in the Exchequer for tithes; *Bishop of London and Beaumont v. Nicholls* (b); and in the Court of Chancery for an account against a previous sequestrator: *Cuddington v. Withy* (c). In that case he is treated as a trustee. So, he may be made a defendant in both those Courts: *Jones v. Barrett* (d). He may also be sued in the Ecclesiastical Court: *Whinfield v. Watkins*; *Hubbard v. Beckford* (e). [Lord Abinger, C. B.—Those are proceedings by the bishop in his own Court against his own agent.] Again, a sequestrator is not removable by the bishop at will, but only for good cause: see the Report of the Commissioners on Ecclesiastical Courts (1832), p. 53. According to the case of *Jones v. Barrett*, the bishop is to be a party to the suit *with* the sequestrator; but if he were a mere bailiff, without interest, he should not have been a party to the suit at all. The cases referred to, moreover, were cases of a sequestration during the vacancy of the living; this is a sequestration for a totally different purpose—to manage and distribute the funds arising from the benefice. The sequestrator is constructively in possession from the time of the publication of the writ, and the profits are bound from that time, as the goods from the delivery of a fi. fa. to the sheriff: *Bennett v. Apperley* (f); *Doe d. Morgan v. Bluck* (g). Now, the sheriff, after the delivery of the writ to him, might recover the goods in

(a) 1 Barnard. (K. B.) 198.

(c) 1 Hagg. C. R. 307.

(b) Bunb. 141.

(f) 6 B. & Cr. 630.

(c) 2 Swanst. 174.

(g) 3 Campb. 447.

(d) Bunb. 192.

trover against a wrong-doer. [*Parke*, B.—The only meaning of the goods being bound by the delivery of the writ, is, that notwithstanding a sale of them afterwards, no property passes to the purchaser. *Alderson*, B.—If the goods were vested in the sheriff, the return of nulla bona would be true, although they were in the possession of the debtor, and he might have seized them.] It is impossible that there can be any *actual* possession of the profits of a benefice; all that the incumbent himself has, is the power of carrying away the tithes when set out. The same right was vested in the plaintiff.

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But it is said that there is a previous sequestration in existence, which prevents the plaintiff from recovering. As to part of the demand, that certainly is not the case; because, after the death of Iveson, no right to receive the profits could survive to his assignees. His sequestration ceased ipso facto on his death: *Clare v. Hedges* (a). [*Lord Abinger*, C. B.—If so, the payment to Collett by the parties liable would not be good, and they are not discharged.] Payment to Collett without notice of Iveson's death would bar any subsequent demand upon them; and if this action succeeds, those who have paid to him will be discharged, because the recovery in the action works satisfaction of the debt, by affirming the receipt: *Major v. Peck* (b), *Hasser v. Wallis* (c). [*Alderson*, B.—A distinction has been taken as to this matter, between revocation by death and by the act of the party: in the former case the authority of the agent determines ipso facto, because there is no principal. *Parke*, B.—The question therefore is, whether a sequestrator has any right of action against a wrong-doer who receives the profits of the living without authority, and with notice.] A personal privity between the parties is

(a) 1 Lutw. 342.

(b) 1 Lutw. 338.

(c) 1 Salk. 28.

Erech. of Pleas, 1842. not necessary to maintain this action : *Spry v. Emperor* (a),
Lightly v. Clouston (b).

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LORD ABINGER, C. B.—I am of opinion that the rule obtained in this case must be discharged. It has been argued with very great ability, and I confess that the argument of Mr. *Baines* has satisfied me that we cannot put this case on the ground that the analogy between the bailiff and the bishop's sequestrator holds throughout; it certainly does not, for the sequestrator is authorized to do many things which a bailiff is not authorized to do. But the authority of the sequestrator only extends to the matters which by the *levari facias* the bishop is directed to execute; he is the agent of the bishop for those purposes. Now, this analogy will hold without any difficulty: that as the courts of common law treat the sheriff as the only person responsible for the performance of the duties prescribed by the writ directed to him, so they also treat the bishop as the only person responsible for the execution of the *levari facias*; and upon a sequestration sued out upon a *levari facias*, which is only the bishop directing his own agent to do all that which the Court has ordered him to do, the Court considers the bishop as the person in possession by his servant or agent, to act for him in all things, and to do and perform all the functions which by the writ he is called upon to do. For instance, by the writ of *elegit*, the sheriff is directed to take possession of the land, and to hand it over to the creditor: the sheriff does not take possession manually, he does it by his agent the bailiff; yet he is regarded by the Court as being in possession, and is the party who is held responsible. In like manner, when the writ of *levari facias* commands the bishop to enter into the living, and to sequester and take possession of it, and

(a) 6 M. & W. 639.

(b) 1 Taunt. 112.

do certain things; he employs his servant to do this, and takes security from him, and he is responsible for any wrong that is done by the sequestrator. The Courts of law would not make any order upon the sequestrator, more than they would on the sheriff's bailiff; it is the bishop who is to return the writ, and he it is who is to account to the Court.

So far, therefore, there is this analogy between the bishop's sequestrator and the bailiff, that they are both the servants of their respective masters, and not of the Court. The servant's possession is the possession of the sheriff in the one case, and the possession of the bishop in the other. But it does not follow that there may not be cases in which the sequestrator, by virtue of contracts which he himself makes with the tenants of the glebe, or the farmers who occupy land, may maintain an action in respect of the glebe or lands let in his own name. I do not know whether he ought to let them or not, but if he does, the tenant may be estopped from denying his title: or if he makes a contract for letting the tithe from year to year—a personal contract with the farmer, by deed or in any other way, that it should be paid to him in the shape of a composition, he might, for aught I know, be able to maintain an action on the contract against the person who was a party to it. But the cases that have been adverted to, as shewing an analogy between a sequestrator and an administrator, appear to me to be wholly inapplicable. It has been pressed upon us, that in the case of an administrator *durante minore ætate*, or an administrator *pendente lite*, it has been decided that such person can maintain an action. But I think the case of an administrator is wholly different; he is the representative of the intestate. The bishop, no doubt, has power to grant either a limited or a perfect administration; but the moment the administration is given, whether it be for a limited term or not, that administration invests the administrator with all the interests and all the powers of a full representative.

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The very object of appointing an administrator *durante minore ætate*, is, that he should do all those things which a full administrator might do, or the minor, if he were of age. I think, therefore, that that case fails to furnish any analogy to the present.

It is then said, that the rectory is in the possession of the sequestrator. Now the rectory is in the possession of the bishop; and when the bishop has appointed his sequestrator to take that possession, and to do what the bishop himself is called upon to do, if another *levari facias* issue to the bishop, and he appoints another agent to act under it in like manner as the first, it is clear that this second agent has no authority to act until the first writ has been satisfied. The whole property is taken under the first writ; and while that is existing, it cannot be said that the second sequestrator has any other interest than to call upon the bishop to make his return to the first; and if, after that is satisfied, there is a balance in his hands, he hands it over to the creditor who makes the application. Here, however, Iveson, the first sequestrator, died: and the plaintiff says, that since his death the defendants have received without any authority. But it is very questionable whether his death put an end to the first writ: I take it that there was no legitimate mode of stopping the sequestration, until the bishop had made a return to it. It appears that the defendants have received the rents by means of the same agent who received them during Iveson's lifetime; and we do not know with certainty whether the other sequestration is satisfied. Suppose a motion were made by the creditors under the first execution for a return of the writ of *levari facias*, and the bishop made the return, and it should appear the debt was not satisfied, but that Iveson was dead; would it not be his duty to appoint another sequestrator? How, then, can we take notice that the first writ is at an end, unless some return be made to it? It may be, if the sequestrator is actually in possession

of the benefice—in clear and undisputed possession—and the tithes are set out for him, and a wrong-doer comes and takes possession of them, that he might, and I think he would, be able to maintain an action against the wrong-doer. At all events, he might bring it in the name of the rector; for though he is in possession of the rectory as against the rector, yet if he chose to admit the possession of the rector for the purposes of the action, I do not see that any defence could be made, unless by a party who could shew payment to the rector or to the bishop. There is no ground of analogy between that case, and the case of a wrong-doer who has obtained possession of that which ought to be in the hands of the bishop upon the execution. It is fully established that the sequestrator cannot appear in equity; he has no *locus standi* in *judicio*: nor is there any authority to shew that he can bring this or any other action at common law, except in the case where he was a party to a contract. That is the only case I can conceive in which the sequestrator would have any right to bring any action at all: and so in such case might the bailiff; for if the bailiff made a contract in his own name, though he had no authority to make that contract, yet it would not lie in the mouth of the other party to object that he had no such authority. But in such a case as the present, it appears to me that the sequestrator cannot maintain any action, even against a mere wrong-doer, until the other sequestration has been disposed of; and we cannot take notice that that is the case, until an application has been made to the Court to compel the bishop to return the writ.

On these grounds, I think the nonsuit was right.

PARKE, B.—I agree in opinion with my Lord Chief Baron, that in this case the nonsuit was right, and I still entertain the same opinion which I expressed when this matter was argued before me at *Nisi Prius*.

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The action was brought to recover certain profits of a living, which came to the hands of the defendants at different times. It appears that a person of the name of Iveson was the sequestrator under an execution at his suit, on two different judgments. He employed a person of the name of Collett to receive the profits of the living under the sequestration. Iveson became bankrupt, and his assignees still continued Collett in their employ, to receive the profits of the living. Iveson afterwards died, the assignees still continuing, through the agency of Collett, to receive the profits of the living: and they are now called upon to pay over the whole of these profits which have been received by Collett; those which came to their hands while Iveson was sequestrator, those received after his bankruptcy, and those received since the death of Iveson, by the assignees, by the agency of Collett. If there were any portion of those profits which could be the subject of an action by the sequestrator, I was wrong in directing a nonsuit.

It seems to me that there is no difficulty whatever in the case, except in regard of that portion of the profits which have been received by the assignees, after the determination of the sequestratorship to Iveson by his death. There is no doubt what the character of a sequestrator is, and that it is one that cannot pass to his executors, administrators, or assigns; and therefore, if the plaintiff was entitled to recover as to that portion of the tithes received by the assignees since the death of Iveson, I ought not to have directed a nonsuit, but a verdict for the plaintiff, subject to the other questions in the cause.

But it appears to me, that even for that portion of the profits of the living the plaintiff cannot recover; for the right which the sequestratorship gave him involves no interest whatever. Let us consider what the right of the sequestrator is. When a judgment is obtained against a spiritual person, a *levari facias* issues to the bishop, and he

is commanded, as in this case, "to enter into the rectory and parish church of Lockington, and take and sequester the same into his possession, and hold the same in his possession until he shall have levied the debt and damages, costs and charges, out of the rents, tithes, oblations, obventions, fruits, issues, and profits thereof, and other ecclesiastical goods in his diocese," and so forth. Therefore the command is *to the bishop* to enter and take possession of the living; and the bishop appoints a sequestrator to make such entry. Then the publication of the sequestration takes place: and the question is, what is the effect of this delegation by the bishop? The effect clearly is, to take the possession out of the rector, and to place it in some person in lieu of the rector. In the case of *Doe d. Morgan v. Bluck*, it was decided that, after the publication, the right of ejectment by the rector is taken away; therefore I assume that the possession is vested in some other person: and the question is, who is the person so put into possession? It is the bishop, according to the terms of this writ, and nobody else. He directs the sequestrator to act for him; and though clothed with duties higher than those an ordinary bailiff has,—for he has undoubtedly some things to do, by consent of the bishop, different from the duties of the sheriff's bailiff,—still in point of law he is the servant of the bishop, and has no interest at all in any of the profits of the living, but is acting merely as a receiver. That, as it appears to me, is the character of the sequestrator, and that is the character which he appears to have had according to the cases. Thus, according to the case of *Jones v. Barrett*, the sequestrator, having no interest in the profits of the living, cannot alone file a bill for tithes, or for the profits of the rectory, but the bishop is the proper person to do so. There is no authority whatever to shew that the sequestrator has any interest in the profits of the living. A case was cited from Barnardiston's Reports, of *Calder v. Ross*, which was ingeniously made use of by Mr. Baines, in his

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able argument, to shew that if the party have authority, not merely to receive but to distribute, he has an interest in the subject of the sequestration, and may support the action. But the case is no authority for that position: it is only the opinion of the Lord Chancellor as to what the Scotch law probably was in the case of the sequestration of the effects of a convicted traitor; and he gave an opinion, that if it was only to collect, in that case he would have no interest, but if it was to distribute amongst the different creditors, without rendering any account to the Court, it gave him a title to recover. It is not intended to be laid down as a general proposition of law, that if a person is appointed a receiver, where there may be conferred upon him an authority, not merely to receive but also to distribute, that would give him an interest in the estate. The case cannot be carried to that extent: and there is no other authority for saying that a sequestrator has an interest in the subject-matter of the sequestration.

Then, it was contended, that this was like the case of an administrator. But his authority is founded on the statute of 31 Edw. 3, st. 1, c. 11, which expressly states that the ordinary is to depute persons, who are to have actions to recover debts due to a deceased intestate. That gives an interest, by the very words of the statute, in all the personal effects of the deceased, and takes them out of the bishop and vests them in the administrator. It is by an express law, therefore, that an administrator has an interest in the effects of the intestate. Therefore, even as to that portion of the profits of the living that may be said to be analogous to the case put in the argument, of the tithe grower having set out tithes, and the intervention of a stranger to take them away, I am compelled by the authorities, and by the nature of the case, to say that no right of action would exist in the sequestrator. It appears to me that the right would be in somebody else, either in the rector or the ordinary, probably in the ordinary, since, according to the case of

Doe v. Bluck, the effect of the sequestration is to put the rector out of possession; and then it follows that the ordinary is in possession, in virtue of the writ by which he is required to take possession. Then I consider that the sequestrator is the mere servant of the ordinary, and subject to his authority.

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The cases that have been cited from the Ecclesiastical Reports, of the sequestrator being called upon to account in the Courts of the ordinary, for not performing his duties, are to be explained on the ground that there the ordinary was calling his own officer to account for not performing the duties he had undertaken to do, he having received a warrant to act upon his mandate.

Upon the whole, it appears to me that this action cannot be sustained, and therefore that the nonsuit was right.

ALDERSON, B.—I am of the same opinion. In this case the defendants are in possession of certain profits of a living, and the question is to whom they are accountable. The living is under sequestration by the authority of a writ of *levari facias* directed to the bishop. The bishop is directed thereby to take possession of the rectory. Whether the taking possession of the rectory, under the writ of *levari facias* by the bishop, ousts the interest of the rector or not, is not material to be decided. If the rector remains in possession, *cadit quæstio*; if the bishop is in possession under the first sequestration, then he remains in possession, and in neither case can the second sequestrator have any right to maintain an action for the profits, or for money had and received.

But I think the sequestrator is also the mere bailiff or receiver, deputed to do certain duties which as an ordinary bailiff of the sheriff he would not do, but still essentially the mere bailiff or steward of the bishop, who is in possession of the rectory; and therefore that he cannot maintain this action.

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ROLFE, B.—I am entirely of the same opinion. The question is, whether there is anything to take this case out of the ordinary principle of law, which will not permit a person in the character of bailiff to maintain an action: whether there is anything peculiar in the character of a sequestrator that can make a different principle applicable to him. I can see nothing, either in principle or authority, to warrant us in coming to any such conclusion. He seems to me to be to all intents and purposes a bailiff. When the writ goes to the bishop, and he appoints a sequestrator, the latter gives a bond to the bishop for faithfully accounting, and causing the duties, and all divine offices and other requisites to be performed. He is appointed entirely on the terms of a mere bailiff or servant acting under the bishop. The terms of the bond shew to what extreme difficulty it would give rise, if any such action as this could be maintained: for it would open, in the temporal Courts, the question whether or not monies that had been supplied for the performance and discharge of divine offices and other requisites, had been properly so applied; whether matters of that sort, of ecclesiastical cognizance, had been duly performed, according to the duty the sequestrator had to fulfil. It was pressed in the argument, that there were several instances of suits by sequestrators, or against them, in courts of equity; but in all those cases the bishop was joined. It was stated that the bishop must be joined, in order to make the suits sustainable, for without him the suit would be demurrable; and the only anomaly that exists is, that the ordinary rule is departed from, and the agent is made a party concurrently with the principal. It is not necessary to speculate what was the origin of that: we know that the Court of Chancery was in early times intimately connected with ecclesiastical history, and it might have been thought fit to make the agent the acting party. But the case that was cited from Swanston's Reports, of *Cuddington v. Withy*, seems to prove exactly the

contrary of the proposition which has been contended for, that the sequestrator can maintain an action. In that case the suit was instituted by a subsequent judgment creditor, and was filed against the previous incumbrancers, the bishop, and the prior sequestrator, for an account. It alleged the issuing of the former sequestration, and that the sequestrator had obtained more than sufficient to perform all the conditions of his bond. Now there is no principle more clearly recognised in Courts of Equity than this—that the cestui que trust never can proceed without joining with him his trustee; and therefore the absence of the second sequestrator in this suit shews clearly that the Court did not consider him as a trustee, or as a person invested with any interest in the subject-matter; and in conformity to that view the judgment of the Court was given. Sir *Thomas Plumer*, who was very conversant with matters of this sort, directs an account to be taken as to what was due to the prior incumbrancer, then next as to the subsequent incumbrancer, and then an account of what had been received by the prior receiver. Then it was said that the surplus money should be paid over to the plaintiff, who was the subsequent creditor. That might have been gross injustice, if the subsequent sequestrator was a trustee, for it might have deprived him of a fund out of which to reimburse himself. That case goes the whole length of shewing, that the sequestrator is not a trustee: he is that which he has always been treated in the text-books as being, namely, a mere bailiff or agent, and consequently incapable of sustaining an action.

On these grounds, I am of opinion that the nonsuit was right.

Rule discharged.

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May 26.

THE QUEEN v. THE EASTERN COUNTIES RAILWAY
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By a coroner's inquisition, it was found that the death of the individual named therein was caused by a steam-engine with a train of carriages running off the railway; that the said steam-engine was then of the value of £125, and was then the property and in the possession of the Eastern Counties Railway Company. There were three other inquisitions on three other persons, in precisely the same form, and imposing a deodand of the same amount. The deodands having been estreated into the Exchequer under 3 & 4 W. 4, c. 99, the Court refused on motion to stay proceedings on three of the inquisitions, on payment of £125 on one of the inquisitions, on the ground that the instrument moving to the death of the party could not be twice forfeited for the same accident, but left the parties to their remedy by traversing or setting aside the inquisitions.

A CORONER'S jury having been summoned to inquire into the cause of the death of one William Austin, they found by their verdict, that on the 18th of August, 1840, a certain railway steam-engine, with a train of carriages containing passengers, &c., ran off the line of railway, whereby the engineer of the said engine was hurt, and the boiler thereof exploded; in consequence whereof the said William Austin was scalded and burnt, and received injury of which he afterwards died; and the inquest proceeded in the usual form to state, that so the said William Austin, in manner aforesaid, accidentally, casually, and by misfortune came by his death; and that the said steam-engine was moving to the death of the said William Austin, and was *then* (that is, at the time of the inquest) of the value of £125, and was *then* the property and in the possession of the Eastern Counties Railway Company. There were three other inquisitions on three other persons, which were precisely in the same form, each imposing a deodand of the same amount. These four deodands having been estreated into this Court under the stat. 3 & 4 Will. 4, c. 99, a rule was obtained by *Cresswell*, on the part of the company, calling upon the *Attorney-General* to shew cause why, upon payment of one sum of £125 in satisfaction of one of the above inquisitions, all further proceedings to levy the rest should not be stayed. The rule was moved upon affidavits that the persons in the several inquisitions named had met their deaths by one and the same accident, and that the engine, &c. in all the inquests were the same, and that consequently the engine having been once forfeited in re-

death of the party could not be twice forfeited for the same accident, but left the parties to their remedy by traversing or setting aside the inquisitions.

spect of that accident, and a deodand imposed, it could not be forfeited a second time in respect of the same accident.

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The *Attorney-General* (*Jervis* was with him) now shewed cause.—It appears from our affidavits, that the sums mentioned in these verdicts were assessed on the supposition that £500 was the proper value of the engine, and the intention of the jury was to divide that sum, and make the defendants pay the amount in four portions of £125 each. This application prays, that upon payment of the sum assessed in one case, the said inquisitions may be quashed. If the application had prayed, that on giving up the engine in one case the others should be quashed, it might have been correct. This rule was moved on the ground that the instrument causing the death cannot be forfeited twice for the same accident; but there is nothing on the face of the inquisition to shew that the deaths of these four persons arose from the same accident; they might have been from two or more accidents. But assuming the objection to be well founded, the proper course was to traverse the inquisition.

Cowling, in support of the rule.—It is said that the inquest has proceeded under a mistake, and that the jury have not awarded four deodands of £125 each, but that they awarded one deodand of £500, according to the number of persons whose deaths were caused by the accident. But that is not so: they are four distinct inquisitions. It is a fixed principle of law that, where an instrument at one time, or on one occasion, causes the deaths of several persons, one deodand only is payable in respect of all. The defendants are, therefore, only bound to pay one deodand of £125. The facts to shew that it was one accident may be proved, though they do not appear in the inquisition. In *Cripps v. Durdan* (a), it was held that a

(a) Cowp. 640.

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person can commit but *one* offence on the *same* day, by exercising his ordinary calling on a Sunday, contrary to the stat. 29 Car. 2, c. 27 ; and that if a justice of peace proceed to convict him in more than one penalty for the same day, it is an excess of jurisdiction, for which an action of trespass will lie even before the convictions are quashed. If the Crown had proceeded in the old common-law mode, by process on the inquisitions, the defendants might have traversed them ; but where the deodands are estreated into this Court, under the recent act 3 & 4 Will. 4, c. 99, a defendant has no other mode of proceeding than by applying to its equitable jurisdiction. If it be shewn that it was one accident which caused the death of the several persons, one deodand only can be payable, and there must be some mode of getting at the real facts of the case.

LORD ABINGER, C. B.—We have no right, on motion, to travel out of these inquisitions, according to the terms of which the Crown is entitled to four engines, or four sums of £125 each. If we were to do so, we should be attempting to explain the record by extrinsic evidence, which we ought not to do. If we are to go out of the record, the affidavits shew that the jury intended to impose a deodand of £500 as the value of this engine ; and we shall not, on affidavits, do any thing which will have the effect of counteracting their intention. If the Company are not liable to pay more than one deodand, they must adopt some other mode of proceeding.

ALDERSON, B.—The day is immaterial, and is no essential part of the finding. These inquisitions are consistent with the supposition of the deaths having occurred on different days, and by different engines. Then it is said, that this is an application to our equitable jurisdiction ; but if we go out of the record at all, we must go out of it on one side as well as on the other. It is in the power of the de-

fendants to redeem the whole sum of £500, by giving up the engine; and if they ask us for equity, they must begin by doing equity themselves.

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GURNEY, B., concurred.

Rule discharged.

BARKER v. BIRT.

May 26.

ASSUMPSIT for work and labour and materials, for money paid, for interest, and on an account stated. Plea, non assumpsit.

At the trial before Lord *Abinger*, C. B., at the London Sittings after last Hilary Term, it appeared that the plaintiff was an advertising agent, to whom the British Waterproofing Company had incurred a debt of 116*l.* 17*s.* 6*d.* for advertisements, up to the month of July 1839, when they ceased to employ him. The defendant did not become a member of the company till the ensuing month of December, when he was also elected a director. In April 1840, the plaintiff attached the funds of the company in the hands of their bankers, whereupon the defendant called upon him, introducing himself as a director, and proposed that the attachment should be withdrawn upon the payment of £50, and the defendant's giving him the following undertaking, which was assented to:—

“London, 27th of April, 1840.

“Sir,—As a director of the British Waterproofing Company, I have to request you will accept the sum of £50 on

A company having contracted a debt with the plaintiff, and the debt not being paid, he laid an attachment on money of theirs in the hands of bankers. While the attachment was in force, the defendant, representing himself to be a director of the company, called on the plaintiff's attorney for the purpose of making an arrangement about the debt, when it was agreed that the following letter should be written by the defendant to the plaintiff, which was accordingly done: “As director of the B. W. Company, I have to request

you will accept the sum of £50 on account of your claim of 116*l.* 19*s.* 7*d.* against the company; and in consideration of your withdrawing the attachment against the funds of the company, I agree on the part of myself and on behalf of the other directors, to pay you the balance of 66*l.* 19*s.* 7*d.* &c. on the 27th of August next:”—*Held*, that this letter, coupled with the above facts, was evidence of an account stated; and that it was no answer to shew that the defendant was not a member of the company when the original debt was contracted.

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account of your claim of 116*l.* 17*s.* 6*d.* against the directors of the company, for advertisements; and I agree on my own part, and on behalf of the other directors of the company, to pay you the balance of 66*l.* 17*s.* 6*d.*, with interest at £5 per cent. per annum from this day, on the 27th day of August next.—I am, sir, &c.

“To Mr. C. Barker.”

“W. BIRT.”

The £50 was paid, and the attachment withdrawn, and this action was brought to recover a portion of the balance of 66*l.* 17*s.* 6*d.*, which had not been paid in accordance with the agreement. The above undertaking was put in and read at the trial, as evidence of an account stated. *Crowder*, for the defendant, proposed to shew that the defendant was not a member of the company at the time when the work was done, and contended that the above letter must be considered as a guarantee or special agreement to be answerable for the debt of another, and was not evidence of an account stated; and that, to render the defendant liable, a special count ought to have been inserted. The learned Judge, however, was of opinion that the promise contained in it, coupled with the fact of the attachment having been withdrawn, was evidence from which an account stated might be inferred, and directed the jury accordingly, who found for the plaintiff for the amount claimed.—*Crowder* having obtained a rule to shew cause why there should not be a new trial on the ground of misdirection,

Martin now shewed cause.—The letter, coupled with the other facts proved, was good evidence of an account stated. This document does not amount to a guarantee, but was merely evidence of the terms on which the defendant became a partner and took upon himself the debts of the company, and was evidence to go to the jury of an account stated. It begins by requesting the plaintiff to accept the sum of £50

on account of his claim on the company, and the writer agrees on his own part and on behalf of the other directors to pay the balance. There is nothing in the nature of a guarantee in that. It is a usual thing for persons coming into a company to take upon them the debts of the company. It is ample evidence on the account stated.

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Crowder, in support of the rule.—The letter must be taken in conjunction with the evidence that the defendant became a director after the work was done and the debt incurred. The persons who were then members remained liable. This amounted to a special agreement between the parties, for a valid consideration, that if the plaintiff would withdraw the attachment, the defendant would pay the balance; and it ought therefore to have been declared on as such. When a man promises on good consideration to pay the amount of an account found to be due, unconditionally, it is agreed that that would be good evidence to support an account stated, because it is an acknowledgment that a debt is due at the time; but this is an agreement partly written and partly oral, whereby the defendant not only undertakes to pay the debt of other parties, but the promise is in its terms conditional. And the evidence is that the attachment was withdrawn the next day in pursuance of such agreement.

Lord ABINGER, C. B.—If we take the words of this letter in their obvious meaning, they amount to an acknowledgment that the defendant and his brother directors were debtors to the plaintiff for the amount of the work done, and that he undertakes to pay the balance remaining due. The defendant contends that he is not liable, at least in this form of action, because he was not a member of the company when the debt was contracted. I do not think he ought to be allowed to say so now, for he has admitted by this letter that he was a member of it, and in

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consequence of that admission got out of the hands of the bankers the money which the plaintiff would otherwise have had. In my opinion, if a party acknowledges the correctness of a stated account, and in consideration of an agreement to give him time, pays part of the debt, and undertakes to pay the balance, that is evidence of an account stated.

ALDERSON, B.—Surely this letter is evidence of an account stated. It admits the correctness of the claim upon the company of which the writer states himself to be a director, and promises, on his own account and that of the other directors, to pay the balance. Then would the fact proposed to be proved, that he was not a member at the time the debt was contracted, be any answer? I think not.

GURNEY, B.—The letter contains an admission that a balance is due, and that the defendant is a director of the company. Is not that evidence to shew that he has taken this debt upon himself?

ROLFE, B., concurred.

Rule discharged.

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1842.

June 1.

BEECHY v. QUENTERY and Another.

THIS was an action of trespass, brought against the defendants, two justices of the borough of Wokingham, for the purpose of trying the validity of a rate made for lighting the town and parish of Wokingham, under the provisions of the statute 3 & 4 Will. 4, c. 90. The facts were stated for the opinion of the Court in a special case, which stated as follows:—

On the 7th of December, 1840, the town and parish of Wokingham duly adopted the provisions of the stat. 3 & 4 Will. 4, c. 90, and, having elected seven inspectors, empowered them to call for the sum of £250, in order to carry into effect the provisions of the said act, for the succeeding year. On the 18th December, 1841, a meeting of rate-payers was held, in compliance with the 18th section of the act, for the purpose (amongst other things) of determining the amount of the money to be raised for the purposes of the act, for the current year; and it was there proposed that £250 should be raised for that purpose; whereupon an amendment was moved, substituting the sum of £20. The original motion was carried by a majority of 52 to 48; but the chairman being of opinion that a majority of two-thirds of the rate-payers present at the meeting was necessary to determine the question of amount, declared that the original motion was lost, and a poll was then demanded under the 9th section, by eight of the rate-payers present, upon the question whether the amount to be raised for the purposes of the current year should be £250 or £20. The poll was afterwards taken, and the result was a majority in favour of the larger amount, but not a majority consisting of two-thirds, even of the rate-payers voting at the poll; and thereupon the inspectors duly issued an order on the overseers to raise the sum of £250 for the current year, and the defendants,

Under the general lighting and watching Act, 3 & 4 W. 4, c. 90, a majority of two-thirds of the rate-payers of a parish is required only at the original meeting to be held under the 9th section, for determining as to the adoption of the act, and as to the amount which the inspectors shall have power to call for in any year: but where the parish has adopted the provisions of the act, a majority of two-thirds is not necessary, in order to determine the amount to be raised for the purpose of the act in a subsequent year, under s. 18, but the resolution of a simple majority of the rate-payers voting at the meeting called for that purpose, or, in case of a poll being demanded, of the rate-payers voting upon it, is sufficient.

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upon the plaintiff's refusal to pay the calls so made by the overseers, granted a distress warrant against him.

The question stated for the opinion of the Court was, whether, under the circumstances, the inspectors could legally require a rate to be made for the purpose of raising the said sum of £250; the plaintiff contending that the rate was altogether illegal, because the proposal that the said sum of £250 should be the amount of money to be raised for the purposes of the act for the current year, was neither carried by a majority of two-thirds of the rate-payers assembled at the meeting of the 18th December, 1841, nor by a majority of two-thirds of the rate-payers qualified to vote, and who voted at the poll; and the defendants contending that a majority of two-thirds of the rate-payers was only required for the purpose of determining the question of the adoption of the act by the parish, and not for the purpose of determining the amount to be raised for the current expenses of the year succeeding the year of its adoption.

If the Court should be of opinion in favour of the former view of the case, judgment was to be entered for the plaintiff by confession, for such sum as the Court should direct: if in favour of the latter view, judgment of non-pros to be entered.

Hayes, for the plaintiff.—The first question is, whether a poll is demandable under the 9th section of the act of Parliament, on the question as to the amount to be raised in the second year of its adoption; if it be, it seems to be clear that, in order to decide it, section 12 requires a majority of two-thirds. The 5th section enacts, that on a requisition by three rate-payers of the parish, a meeting of the rate-payers shall be held, for the purpose of determining whether the provisions in the act contained shall be adopted and carried into execution in the parish: and section 8 provides, that if, at such meeting, it shall be de-

terminated by a majority, consisting of two-thirds of the votes of the rate-payers present, that the provisions of the act shall be adopted, they shall thereupon take effect, and inspectors shall be appointed. Then, by sect. 9, it is enacted, "that the rate-payers shall, at their first meeting, or at some adjournment thereof, *and so on from time to time in every succeeding year*, at a meeting to be called for that purpose in manner hereinafter mentioned, fix and determine the total amount of money which the inspectors shall have power to call for in any one year, in order to carry into effect the provisions of this act: provided nevertheless, that any five rated inhabitants, qualified to vote as hereinafter mentioned, may, at such meeting or adjournment thereof, demand a poll to be taken of the rate-payers qualified to vote, upon the question as to whether this act and the provisions thereof, or any part thereof, shall be adopted in such parish, and also as to the amount of money to be raised *in the succeeding year* for the purposes thereof, and the number of inspectors to be elected at such meeting." The words "such meeting or adjournment thereof," in this proviso, apply, by reference to the former part of the section, to the meetings to be held in every succeeding year, for determining the amount to be raised, as well as to the original meeting for determining on the adoption of the act, and a poll is, therefore, demandable at all such meetings. The form of notice of the poll, and of the voting paper, given in the 10th section, leave the question in doubt: and even if they appear to have reference only to the first year, they cannot be held to control the preceding section of the act. [*Alderson, B.*—For the purpose of the adoption of the act, a poll is required, in order to give absent rate-payers an opportunity of exercising their opinion. But is it not a general rule, that when a thing is to be decided on by a majority of votes, they are to be taken by poll, if required?] Yes; *Campbell v. Maund* (a)

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[(a) 5 Ad. & E. 865; 1 Nev. & P. 558.

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is an authority to that effect. Then, secondly, if a poll was demandable, a majority of two-thirds was necessary to the decision. The poll could only be taken according to the provisions of the act, which recognises only a majority of two-thirds. The 12th section directs the churchwardens to declare whether or not two-thirds of the votes given have been given in favour of the adoption of the act, and also as to the sum of money to be raised in the succeeding year: and then follows a proviso, "that in case of a poll being demanded as aforesaid, the adoption or non-adoption of this act, with the sum to be raised, and the number of inspectors to be elected as aforesaid, shall be decided by such number of votes as aforesaid," that is, by a majority of two-thirds. [*Alderson, B.*—I think the true construction of the act is, that the amount to be raised is to be fixed at the first meeting: they are to vote, in the first instance, such a sum as they are not to exceed in any one year.] The 18th section appears to be inconsistent with that view: it enacts that the inspectors are to give notice, at the expiration of twelve months from the day of the adoption of the act, to the churchwardens, that they are ready to produce their accounts, and the churchwardens are thereupon to give notice of a meeting, for that purpose, for the election of inspectors, and "for determining the amount of the money to be raised for the purposes of the act, *for the current year*:" and in every future year, such meeting is to be held on the same day. [*Alderson, B.*—That is subject to the original limit fixed by the majority of two-thirds; but in that case, no more is required than a simple majority. *Gurney, B.*—After the act is adopted, there is no need of a majority of two-thirds for any subsequent purpose; and by the 15th section, after three years, the act may be abandoned by a simple majority.]

Kelly, contra, was stopped by the Court.

ALDERSON, B.—I am clearly of opinion that the defendants are entitled to the judgment of the Court. The true construction of the act is, that at a meeting called in a particular way, subject to certain regulations, whereby the matter shall be fully canvassed, the rate-payers are to be called together to determine whether the act shall be adopted, with this term, that more than a certain sum, then to be fixed, shall not be called for in any year. That question is to be determined by a majority of two-thirds of the votes of the rate-payers present at the meeting; and if a poll be demanded, by two-thirds of the votes of the rate-payers qualified to vote, who must constitute a clear majority of the rate-payers of the parish. The sum then agreed to is to be the limit of the amount to be called for in any year; but when once this has been so decided, the parish are bound by the provisions of the act for three years. The words "in every succeeding year," in the 9th section, apply to meetings held under the 16th section, to determine upon the adoption of the act, where the proposition for its adoption has not been carried at the first meeting convened for that purpose under the former section. That section enacts, that in the event of a majority of two-thirds not having determined to adopt the provisions of the act, it shall not be lawful for the inhabitants to meet again in less than one year from the period at which such meeting shall have been convened. The demand of poll, therefore, in the 9th section, applies only to the first meeting for the adoption of the act, or some adjournment thereof, or to a meeting to be called for the adoption of the act in a succeeding year, under the 16th section: then the poll is to be taken and declared in the manner provided for by the 10th, 11th, and 12th sections. It is clear, therefore, that this demand of poll applies only to the question of the amount to be raised, as part of the general question as to the adoption of the act; and when that has once been determined, the parish are bound to the act for three years:

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and then comes the provision of the 18th section, by which a meeting is to be called for the purpose of determining how much, up to or short of the original amount agreed to, shall be levied in any succeeding year. That is to be determined in the ordinary way, that is, by a simple majority. I think, therefore, that the inspectors in this case were entitled to call for the full amount of the £250, which was agreed to by a majority of the rate-payers, and that the rate is perfectly good.

GUENEY, B.—I am of the same opinion. The proposal of the smaller sum amounted in fact to a repeal of that clause of the act which bound the parish by the adoption of its provisions for three years.

ROLFE, B., concurred.

Judgment for the defendant.

May 31.

GIBBS v. POTTER.

On a shipment of a cargo from Valparaiso to England, the bill of lading described the property as "1338 hard dollars," which was a coin current at Valparaiso at the time:—*Held*, that this was a sufficient compliance with the provisions of the stat. 26 Geo. 3, c. 86, s. 3, it being the current coin of the place where the shipment was made.

CASE.—The declaration stated, that the plaintiffs shipped 1338 hard dollars on board a certain ship belonging to the defendants, to be by them carried in the said ship from Valparaiso in South America to Liverpool or London, at the option of the consignees; and if at the former port, then to be further conveyed by the defendants to London by land, saving all casualties arising from the act of God or the Queen's enemies; and averred a loss of the said dollars by negligence on the part of the defendants.

Pleas, first, not guilty; secondly, that at the time of the said shipping and lading, the said dollars consisted of

Quere, whether that statute is at all applicable to the case of shipments made in places not subject to the British laws.

a certain large quantity of silver, and that the same were feloniously stolen out of the said ship, without the privity of the defendants, and that neither the owners nor the shippers thereof inserted in their bill of lading, or otherwise made, any declaration in writing of the true nature, quality, and value of the said goods, according to the form of the statute, &c. Replication, *de injuriâ*.

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At the trial before *Alderson, B.*, at the last Spring Assizes for Surrey, it appeared that the plaintiffs, who were English merchants residing at Valparaiso, had there shipped these dollars on board a ship of which the defendants were registered owners, and delivered with them a bill of lading, which merely described them as "1338 hard dollars." It appeared also from the evidence, that, at the time of the above shipment, hard dollars were current at Valparaiso but not in England; nor were they sold here as bullion, but by weight; and their value in the market was influenced by the rate of exchange between the two countries. The principal value of the dollar in England depended on what it might fetch on being sent abroad. On this state of the evidence, it was objected that the defendants were not liable, the provisions of the 26 Geo. 3, c. 86, s. 3, not having been complied with. That statute enacts, that "no master or owner of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons, any loss or damage which may happen to any gold, silver, diamonds, watches, jewels, or precious stones, which from and after the passing of this act shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare in writing to the master, owner, or owners of such ship or vessel, the true nature, quality, and value of such gold, silver, diamonds, watches, jewels, or precious stones."

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The learned Judge, however, overruled the objection, and directed a verdict for the plaintiffs for the value of the dollars, reserving leave to the defendants to move to enter a verdict on the second issue, on the point made at the trial. *Channell*, Serjt., having obtained a rule to shew cause accordingly,

Peacock (and *Thesiger* was with him) now shewed cause. —First, the dollars were sufficiently described as dollars of the value they obtained according to the currency of the country where they were shipped. That is the only description which could be given with any safety, because the value in this country would depend upon the rate of exchange at the time, which could not be known at the time at the place of shipment, and therefore it was impossible to describe their value in British money. But they are always of the same value at Valparaiso, where they are current. Therefore, to describe them as “1338 hard dollars.” was the proper mode. The object of the act was merely to put the owners of the vessel on their guard that the package was a valuable one. If the owners were resident there, they would be more accurately informed of their responsibility by a statement of the value in the current coin of their own country than of this; and if they were not resident there, the captain, who is their agent, would necessarily be acquainted with the money of the country with which he was trading. Secondly, the provision in the statute does not extend to contracts made abroad, and therefore the *lex loci contractûs* would apply, and govern the engagement. The shipment was made at Valparaiso, and the contract was entered into there. There is no allegation in the plea that these parties were British subjects, or bound by the English law. There is no evidence of there being any law at Valparaiso which requires the nature, quality, and value of the goods to be described. The plea says, that neither the owners nor the shippers

thereof inserted in the bill of lading the true nature, quality, and value of the goods, according to the form of the statute. That was an important allegation, which required to be proved, and the defendants ought to have shewn that there was such a law at that place, and proved that law as all foreign laws are proved as matters of fact. There is no allegation that this was a British ship, or that the parties were British subjects, and therefore the parties must be presumed to have contracted according to the law of the country where the contract was made.

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Petersdorff, in support of the rule.—There is a condition precedent to the recovery of the price of articles of this nature, which have been stolen, that the value should be stated in the manner required by the laws of this country. The value of the dollars should be stated according to their value in England, and not in foreign coin, which the Court cannot recognise. In a declaration on a bill of exchange for the payment of so many hard dollars, evidence must be given to shew their value in English money; and an indictment for stealing a hard dollar, without alleging it to be of some value in English money, would be insufficient. Suppose this had been gold or silver in bars, would it have been sufficient to have described it as of the value of so many hard dollars? Clearly not, as the enumeration in hard dollars communicates no correct ascertained value to the jury.

LORD ABINGER, C. B.—I am clearly of opinion that the verdict was right, and ought not to be disturbed. Even supposing the act does apply to the case of shipments made in foreign countries at all, it can only apply so far as to require the declaration of value to be made in the current coin of the country where the shipment is made; for how absurd would it be for us in England to make a law to compel a Spaniard, who might have occasion to ship dollars

Exch. of Pleas, at Valparaiso, to declare on the back of his bill of lading the value of those dollars in English currency. Such a law would manifestly be most absurd. The object of the act manifestly was to impose on the shipper the onus of giving notice to the shipowner of the nature of the goods intrusted to him to carry, and that is perfectly satisfied by the value being declared in hard dollars, or whatever else the current coin may be of the place where the shipment is made. But I have great doubts as to the extent of the operation of this act. The present action is, it is true, brought on an English bill of lading, and so far may be distinguishable; but suppose the case of a contract like this, transitory in its very nature, made in a foreign nature in a foreign port, between two parties who are foreigners, how absurd would it be for us to make laws regulating the mode in which they should transmit goods from one country to another! At most, the statute could only apply where the shipment is made to England, and in which case a declaration of value according to the current coin of the country would be sufficient. This rule must therefore be discharged.

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ALDERSON, B.—I am still of the opinion I expressed at *Nisi Prius* in this case, that the second issue on this record ought to be found for the plaintiffs. There can be no doubt that the declaration of the value of the goods must be made *at the place* of shipment; and then comes the question, whether it is sufficient for the shipper to make that declaration according to the current coin of that place; and I think that in holding the affirmative of that proposition, we shall give more effect to the provisions of this act of Parliament, because the shipowner, who must know the value of the current coin at that place, is thereby enabled to form the most accurate judgment as to the degree of care to be bestowed on the goods entrusted to him. Suppose, instead of dollars, the articles shipped were jewels or

precious stones, would it not be by far the best plan to state how much they were worth in the coin of Valparaiso than in the coin of England, where their value would be in a great degree matter of speculation? The question, in short, is this; does the act require the value of the goods to be stated according to their actual value at the place of shipment, or according to a speculative value which they may possess on their arrival in another country? The latter arrangement would be a very bad one.

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GURNEY, B., concurred.

ROLFE, B.—I am of the same opinion. At the time this rule was granted, I entertained some doubt on the point, owing to this consideration, that supposing a man at Valparaiso were to ship 10,000 sovereigns at that port for England, would it not be sufficient in his bill of lading to say that the shipment consisted of 10,000 sovereigns, without adding their value in dollars? But I think that doubt arose from a misapprehension as to the words used in the act, which does not say that you must state the money value of the goods shipped, but that you must state their “true nature, quality, and value,” which means, not that you must state the actual true quality or value of the articles in money, which in many cases might be impossible, but that so far as the nature of the thing allows you to do so, you will give the value of the goods or precious stones as nearly as you can. I do not, however, say that the description might not be good either way, either describing them as being of the value of so many pounds sterling, or as is the case here, 1338 hard dollars only.

Rule discharged (a).

(a) A cross rule had been obtained, if necessary, on the part of the plaintiffs, for leave to enter judgment non obstante veredicto, in the event of the defendants' rule being made absolute, on the

ground that the act did not at all apply to the shipments made in places not governed by British law: but that point, in the result, it became unnecessary to discuss.

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June 3.

In a town cause, where issue is joined in term, the defendant is entitled to move for judgment as in a case of nonsuit in the next term but one, although no notice of trial have been given.

HEELS v. KIDD.

IN this case *Cooper* had obtained a rule nisi for judgment as in case of a nonsuit. It was a town cause. Issue was joined on the 31st January, 1842 (the last day of Hilary Term), and no notice of trial had been given.

Hoggins shewed cause, and referred to *Higgins v. Stanley* (a) as the last case on this subject, and as being a direct authority that this motion was made too soon. He mentioned also the cases of *Duggan v. Wilbraham* (b), and *Doe d. Balls v. Margrave* (c).

Cooper, contra, urged that the practice on this point had been settled by this Court, after conference with the other Judges, in *Gough v. White* (d), which was recognised and acted upon in *Pierson v. Chessun* (e), and *Thomas v. Jones* (f); and that the true rule being that a party was bound to take a step in each term, this motion was not too soon; since, issue having been joined in Hilary Term, the plaintiff had Easter Term in which to enter the issue and give notice of trial.

Cur. adv. vult.

LORD ABINGER, C. B., now said—In consequence of the apparent conflict between the case of *Higgins v. Stanley* and the previous decisions which were cited for the defendant, we were induced to consult the Judges of the Court of Common Pleas on the subject; and they agree with us, either that the facts of the case in *Higgins v. Stanley* were not really applicable to the present, or, if they were, that

(a) 2 Man. & Gr. 336.

& Gr. 334.

(b) 1 Scott, N. R. 212; 1 Man. & Gr. 240.

(d) 2 M. & W. 363.

(e) 6 Dowl. P. C. 507.

(c) 1 Scott, N. R. 213, n.; 1 Man.

(f) 7 Dowl. P. C. 712.

it was wrongly decided. It must therefore henceforth be considered, that the rule laid down by the Court of Queen's Bench is the true one; and that if, in a town cause, issue be joined in a term, the defendant may move for judgment as in case of a nonsuit in the next term but one after that.

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ALDERSON, B.—The principle is clear, that a plaintiff is bound to take a step in the cause in each term; and he should try the cause either during the term following that in which issue is joined, or in the vacation after it: if he omits to do so, he fails to proceed to trial according to the course and practice of the Court, and the defendant is entitled under the statute to apply for judgment as in case of a nonsuit. If the rule were not so, there would be a difference between country and town causes; for in the former, one assizes only is required to pass over before the motion is made, where issue was joined in the term next but one before the assizes.

Rule discharged on a peremptory undertaking.

On a subsequent day in the term, *Alderson*, B., stated that it had been discovered that the case of *Higgins v. Stanley* was erroneously reported (a); and he handed the following rule or directions to the officers of the Court, for their guidance:—

“ In Town Causes.

“ Issue joined in, or in the vacation before, any term, a motion for judgment as in case of a nonsuit may be made in the second term next after. Thus, issue joined in, or

(a) See 2 Man. & Gr. 956.

Esch. of Pleas, in vacation before, Hilary Term, motion may be made in
1842. Trinity Term."

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[This rule was pronounced by the Court after a conference with the Common Pleas respecting the case of *Higgins v. Stanley*, 2 Man. & G. 336, and overruling that decision.]

"In Country Causes.

"Issue joined in, or in vacation before, an issuable term,

"Motion after lapse of two assizes.

"Issue joined in, or in vacation before, a non-issuable term,

"Motion after a lapse of one assize."

June 3.

YORKE, Assignee of Moody, an Insolvent Debtor, v.
BROWN.

The assignee of an insolvent debtor, on his acceptance of the appointment, has vested in him all the estate of the insolvent from the date of the vesting order.

And in trover by such assignee, for a conversion of part of the insolvent's estate before his appointment, and in the time of the provisional assignee, a copy of the adjudication of the

prisoner's discharge, certified pursuant to the stat. 1 & 2 Vict. c. 110, s. 105, shewing the date of the vesting order, is good evidence of the plaintiff's title.

But the order of appointment of the assignee is not evidence of the time from which his title accrues, but only of the appointment itself.

TROVER for hay, alleging a possession in the plaintiff as assignee, and a conversion, after the insolvency. Pleas, first, not guilty: secondly, that the plaintiff was not lawfully possessed as such assignee, in manner and form, &c.; on which issues were joined. At the trial before *Erskine, J.*, at the last Somersetshire Assizes, it appeared that the hay in question had been the property of Moody, the insolvent, who made a pretended sale of it to his son, through whom the defendant claimed it, and carried it away from Moody's premises on the 7th September, 1841. In order to prove the title of the plaintiff as assignee at the time of the conversion, the following orders of the Insolvent Debtors' Court, under the seal of that Court, were put in evidence:—

“ Pursuant to the Act for the Relief of Insolvent Debtors
in England.

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“ At a Court held by Henry Revell Reynolds, Esq., Her
Majesty’s Chief Commissioner for the Relief of Insolvent
Debtors, at Wells, in the County of Somerset, on the
24th day of November, 1841,

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“ In the matter of William Moody, a Prisoner in the Gaol
of Ilchester, in the said County.

“ Upon hearing the matters of the schedule of the said
prisoner, and upon examination made into the same, and
executing a warrant of attorney in pursuance of the said
act: forasmuch as it appears to the said commissioner that
the said prisoner has fraudulently, with intent of diminish-
ing the sum to be divided among his creditors, concealed
part of his property, it is adjudged and ordered, that the said
prisoner shall be discharged from custody, and entitled to
the benefit of the said act, as to the several debts and sums
of money due, or claimed to be due, on the 24th day of
August, 1841, being the time of making the order vesting
the estate and effects of the said prisoner, pursuant to the
statute in that behalf, from the said prisoner to the several
persons named in the said schedule as creditors, or claim-
ing to be creditors, for the same respectively, or for which
such persons gave credit to the said prisoner before the
said time of making such vesting order, and which were
not then payable; and as to the claims of all other persons
not now known to the said prisoner, who may be indorsees
or holders of any negotiable security set forth in the said
schedule so sworn to as aforesaid, so soon as the said pri-
soner shall have been in custody, at the suit of one or more
of the persons above mentioned, for the period of twelve
calendar months, to be computed from the said time of
making such vesting order as aforesaid.

(Signed) “ H. R. REYNOLDS,
Chief Commissioner.”

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On which was indorsed the following certificate:—

“ 26th March, 1842.

“ I do hereby certify that this is a true copy of the order of adjudication made in the matter of William Moody.

“ EDWARD INGPEN, Dep. to J. Massey,
Chief Clerk of the Court for Relief of Insolvent Debtors,
in whose custody the same now is.”

“ Pursuant to the Act of Parliament.

“ Court for Relief of Insolvent Debtors, 29th Nov. 1841.

“ In the matter of William Moody, late of Everurch, in the County of Somerset, Farmer:—

“ Whereas by order of the Court, bearing date the 24th day of August, 1841, and entered of record in this Court, the estate and effects of the said insolvent debtor were vested in Samuel Sturgis, gentleman, provisional assignee of the estates and effects of insolvent debtors in England, pursuant to the provisions of the statute in that behalf: It is ordered, that John Yorke, of Thrapstone, in the county of Northampton, esq., shall be, and the said John Yorke is hereby appointed assignee of the estate and effects of the said William Moody, for the purposes of the statute. By the Court.

“ Entered of record, acceptance being signified.

(Signed) “ S. STURGIS,
Provisional Assignee.”

This latter document was upon parchment, but had no certificate indorsed. It was objected for the defendant, that it was no evidence of the appointment of the plaintiff as assignee; but that even if it were, there was no evidence to shew the property to have belonged to him at the time of the conversion, for that the recitals in these two orders were not evidence of the date of the vesting order; and the conversion, at all events, had not taken place in his time, but in that of the provisional assignee. The learned Judge

overruled the objections, and under his direction a verdict was found for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

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Bere, in Easter Term, obtained a rule accordingly, against which

Erie and *Butt* now shewed cause.—The document of the date of 29th November, which was produced in evidence, was the original appointment of the plaintiff as assignee, under the seal of the Court, with the certificate of the provisional assignee annexed, pursuant to the 1 & 2 Vict. c. 110, s. 46, and was sufficient, and indeed the best; evidence of his appointment. The 46th section makes copies of such appointments upon parchment, and indorsed with the certificate of the provisional assignee, and purporting to be sealed with the seal of the Court, evidence of the appointment; but it does not preclude the proof of the fact by the production of the original instrument. The only objection that could be made was that it did not come within the 105th section, which directs that the officer of the Insolvent Debtors' Court shall, on the request of a prisoner or a creditor, provide him with copies of the petition, vesting order, schedule, order of adjudication, or any other order or proceeding; and enacts that a copy thereof, purporting to be signed by the officer or his deputy, certifying the same to be a true copy, and purporting to be sealed with the seal of the Court, shall be admitted as sufficient evidence of the same, without any other proof. But the 46th section refers to quite different copies, and differently certified, from those mentioned in s. 105. This document, therefore, was admissible as evidence of the plaintiff's appointment; and it was evidence also, although not conclusive, of the time from which the appointment took effect. The 45th section empowers the Court, at any time after the making of the vesting order, to appoint a proper person

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or persons to be assignee or assignees of the estate and effects of the prisoner for the purposes of the act, and enacts, that when such assignee or assignees shall have signified to the Court his or their acceptance of the appointment, the estate, effects, rights, and powers of such prisoner, *vested in such provisional assignee as aforesaid*, shall immediately, by virtue of such appointment, and without any conveyance or assignment, vest in the said assignee or assignees, in trust for the benefit of the creditors. By that section, therefore, the provisional assignee is superseded, and the creditor's assignee acquires all the rights of the former in the estate, from the period from which he had them; that is, from the date of the vesting order. Under the old law, when an actual assignment was necessary, the creditor's assignee, by virtue of the assignment to him, stood by relation in the place of the provisional assignee, and no action was afterwards brought in the name of the latter: *Hepper v. Marshall* (a); *Willis v. Elliott* (b): and the late act merely substituted the vesting order for the original assignment, and the appointment for the ultimate assignment. That being so, the appointment is evidence of title, not merely from the time when it bears date, but of all the title which under the statute it operates to convey. [Lord Abinger, C. B.—There is no provision to make the appointment evidence of the time from which the title accrues. *Alderson, B.*—The act makes this evidence of the appointment, but it does no more; you must still prove the other fact, when the provisional assignee was appointed, by the same process, namely, by a certified copy of the vesting order. It is no essential part of the appointment of the creditor's assignee, that he should take from the date of the vesting order. Whatever was before vested in the provisional assignee, he takes by this document; but what rights were in the provisional assignee is to be proved

(a) 2 Bing. 372; 9 Moore, 710. (b) 4 Bing. 332; 1 Moo. & P. 19.

by the vesting order.] The schedule has always been read as evidence of the dates recited upon it. At all events, the proof of the order of adjudication, which recites the dates of all the previous proceedings, was sufficient evidence of title before the conversion. [Alderson, B.—The time of filing the petition is an essential part of the adjudication as to the discharge of the prisoner; that document, therefore, is evidence of that date.] Yes; it is evidence of all which by the statute ought to be stated therein: and it appears from it that the title of the provisional assignee, and therefore of the plaintiff, accrued on the 20th of August. [Lord Abinger, C. B.—The difficulty appears to be removed by the proof of the adjudication.]

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Bere, contra.—It is submitted that the true interpretation of the statute is, that the estate vests in the creditor's assignee only from the date of his appointment. By the 7 Geo. 4, c. 57, s. 19, the estate was, by express words, vested in the assignee by relation to the original assignment. The words of that clause are—"and after such conveyance and assignment by such provisional assignee, all the estate and effects of such prisoner shall be to all intents and purposes as effectually and legally vested *by relation* in such assignee or assignees, as if the said conveyance and assignment had been made by such prisoner to him or them." The words of the present act are quite different: the 45th section merely says, that when the assignee shall have signified to the Court his acceptance of the appointment, the estate, &c. *vested in such provisional assignee as aforesaid*, shall immediately vest in the assignee for the benefit of the creditors. Those words are satisfied by giving him the same estate as the provisional assignee had, but from the date of his appointment only. [Alderson, B.—The provisional assignee has all the estate of the prisoner vested in him, and all that he has vests in the new assignee; therefore, it is the estate of the prisoner which is transferred to the new assignee. Then was not this

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part of the estate of the prisoner on the 24th of August ?] Then it should have been laid as a conversion in the time of the provisional assignee, like the case of a conversion in the lifetime of a testator or bankrupt, in an action by the executor or assignee. The plaintiff does not take in his own character, except from the time of his appointment.

Secondly, the copy of the adjudication is no proof of the title of the assignee: for that purpose it should be certified by the officer to be a copy, under s. 105. Neither is it evidence by way of recital, of the date of the vesting order. [*Alderson, B.*—It is an adjudication of the prisoner's discharge on a given day, which is a certain period of time from the date of the vesting order.] It is not an adjudication that such was the day on which the vesting order was made; that appears merely by way of recital. [*Lord Abinger, C. B.*—The very thing the Court is to do is to adjudge the prisoner to be discharged from all the debts due at the time of making the vesting order; therefore that date is an essential part of the adjudication.]

LORD ABINGER, C. B.—There was proof of a conversion after the 24th of August, from which period all the estate of the insolvent became vested in the plaintiff. After the assignee is appointed, all the rights of the prisoner vest in him from the date of the vesting order. Then, as to the evidence to shew this to have been the date of the vesting order, that appears from the adjudication, which must state it, because the Court is to adjudge the prisoner to be discharged from all the debts that were due from him at the time of making the vesting order. The date, therefore, of that order is an essential part of the adjudication, and consequently the adjudication is good proof of it. I agree that the copy of the appointment is merely evidence of the appointment, but no evidence of the vesting order.

ALDERSON, B.—As soon as you shew the adjudication, and by it the date of the vesting order, the admission on

the record that the plaintiff is assignee decides the matter, because the assignee takes all the rights of the insolvent from the date of the vesting order.

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GURNEY, B., and ROLFE, B., concurred.

Rule discharged.

DAINTREE v. HUTCHINSON.

June 2.

ASSUMPSIT. The first count of the declaration stated, that the plaintiff being the owner of a certain greyhound, and the defendant of a certain other greyhound, thereupon theretofore, to wit, on the 28th of November, 1840, it was agreed between the plaintiff and the defendant, that a match should be made between the said two greyhounds, and that the said greyhounds should run three several courses, the one greyhound against the other greyhound, in one day; and that whichever of the said greyhounds should prove the best in the said three courses should be the winner, and that the owner thereof should receive from the owner of the other greyhound the sum of £100; and

A coursing match is a game within the meaning of the 9 Anne, c. 14, s. 3, and an agreement to run such a match for more than £10, or to forfeit the same amount in default of running it, is an illegal agreement, and an action for the penalty for not running the match cannot be sustained.

The objection, that the match was illegal under the 16 Car. 2, c. 7, s. 2, cannot be taken unless pleaded specially, although the objection appears on the plaintiff's pleadings or case.

The plaintiff and defendant made an agreement in writing to run a match with greyhounds "on the Wednesday during the Newmarket February meeting, 1841." It appeared that the Newmarket meetings were meetings of a coursing club; that the power of appointing and adjourning meetings was vested in the stewards, who were governed by printed rules; and that the practice of the club was to hold the February meeting on the first Tuesday in that month, weather permitting; but if the weather prevented its being then held, to adjourn it to a future day, weather permitting. At the time when the contract was made, the day appointed for the February meeting was Tuesday, the 2nd February, 1841. On Wednesday, the 3rd, the plaintiff and defendant were there, but frost prevented the meeting from being then held, and it was adjourned to Tuesday the 9th, and again, from the same cause, to Tuesday the 16th, when it was held. On Wednesday, the 17th, the plaintiff was ready with his dog to run the match, but the defendant made default.

Held, first, that the true construction of the contract was, that the match should be run on the Wednesday during the February meeting, whenever it should be actually held, and therefore that the plaintiff performed his part of the contract by being ready to run on Wednesday the 17th.

Secondly, that the plaintiff was not bound to produce the printed rules, but it was enough for him to shew that the February meeting was then actually held.

Held, also, that evidence was admissible to shew the meaning of the words "P. P." subjoined to the agreement.

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it was further agreed, that each of the said parties should name a judge to decide upon the said courses, and that the said judges should appoint a referee, and that the said match between the said greyhounds should be run on the Wednesday during the Newmarket February meeting, 1841; and that the said sum of £100 should be forfeited by the party making default in causing his greyhound to run the said match or courses, which said sum so forfeited should be paid by the party forfeiting the same to the other of the said parties who should be ready to run his said greyhound. The declaration then, after alleging mutual promises, averred, that the Wednesday during the Newmarket February meeting, 1841, was a certain day, to wit, the 3rd day of February, in the year 1841, which period had elapsed before the commencement of this suit; and that the said greyhound of the plaintiff was then ready to run the said match or courses, and for that purpose was then put in the dog-slips, and that the defendant was then called upon to produce his said greyhound to run the said match; and that the plaintiff was then ready to have named his judge of the said match or courses, if the defendant would have produced his said greyhound ready to run the said match: yet that the defendant did not nor would then cause his greyhound to run the said courses or match, but therein failed and made default, and thereby forfeited and became liable to pay to the plaintiff the said sum of £100; but that the defendant had not paid the said sum, but refused to do so. There was also a count on an account stated.

Pleas, first, non assumpsit; secondly, to the first count, that the plaintiff's greyhound was not ready to run the said match, in manner and form, &c.; thirdly, to the same count, that the agreement in the declaration mentioned was rescinded by mutual consent before breach thereof; and fourthly, to the same count, that the plaintiff, before

breach, exonerated the defendant from his said promise; on which pleas issues were taken and joined.

The cause was first tried before *Alderson*, B., at the Summer Assizes for Cambridgeshire, 1841, when the following agreement, dated 28th November, 1840, was put in in support of the plaintiff's case:—

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“ Mr. Hutchinson, of Norwood, Nottinghamshire, challenges Captain Daintree to run a greyhound against one of his for £100, the best of three courses in one day, and the two following dogs being named: Mr. Hutchinson names red-and-white dog Grasper; Captain Daintree names fawn-and-white dog King Cob; each party to name a judge; those judges appointing a referee: the said match to be run on the Wednesday during the Newmarket February meeting, 1841. P. P.

“ J. Hutchinson,

“ Witnesses to the signing,

“ J. C. Daintree.”

H. B. Caldwell,

Richard Bagge.”

It appeared in evidence that the plaintiff was a member of the Newmarket Club, but the defendant was not. At the time the agreement was made, the Newmarket February meeting stood appointed for Tuesday the 2nd February, weather permitting; and it was shewn to be the practice of the Newmarket Club to fix at their November meeting the time for the next February meeting, which was usually the first or second Tuesday in that month, *weather permitting*; and if at the meeting the ground proved to be unfit for coursing, their practice was to adjourn to a given day, or the first open day.

On Tuesday, the 2nd February, 1841, the plaintiff and defendant both attended at Newmarket; but there being at that time a hard frost, it was impossible to run the match, and the club adjourned to Tuesday the 9th, weather permitting. The frost, however, continued beyond that day, and the meeting was ultimately held on Tuesday,

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the 16th. On Wednesday, the 17th, the plaintiff came with his dog ready to run the match, but the defendant did not appear. Evidence was tendered to shew that the letters P. P. signified that the parties were bound either to run the match or forfeit the stakes. This evidence was objected to, but was received by the learned Judge. In summing up the case to the jury, his lordship directed them, that inasmuch as at the time the agreement was made Wednesday the 3rd February was the day fixed upon for running the match, and the plaintiff was not shewn to have been ready with his dog to run the match on that day, and the defendant was not shewn to have consented to run the match on any other day, the second issue ought to be found for the defendant. The jury accordingly found that issue for the defendant, and for the plaintiff on the other three issues.

In Michaelmas Term last, *Kelly* obtained a rule for a new trial, on the ground of misdirection, and that the evidence objected to had been improperly received. At the sittings in banc after that term (Dec. 1),

Gunning (with whom was *Biggs Andrews*) shewed cause.—The ruling of the learned Judge was correct. This being a written contract made between these two parties, could not be altered by third parties (as the Newmarket Club must be taken to be), without any notice to or consent by the defendant. At least it should have been shewn that the defendant, who was not a member of the club, was aware of the nature of its rules. This was an agreement for a match to be run on a certain day, Wednesday the 3rd February, and the day could not be varied without the defendant's consent. [*Alderson*, B.—It is a question of construction, not of alteration; namely, whether the expression in the agreement, “the Wednesday during the Newmarket February meeting,” means the Wednesday of the week in which the meeting was then intended to be held, or the Wednesday during the February meeting, whenever that might take

place: if the latter, that would be Wednesday the 17th, because there was no Wednesday during the meeting which began on Tuesday the 2nd, and which was adjourned on that day.] The meaning could hardly be, that the defendant should be subjected to the inconvenience of bringing his dog from a distant place at every adjournment of the meeting which the club might choose to make.

Secondly, the evidence in explanation of the letters P.P. ought not to have been admitted. [*Alderson*, B.—Standing by themselves, those letters are insensible; but the evidence confers a real meaning upon them, by shewing what the parties intended by them, and that they were inserted with the view of expressing a given thing. *Parke*, B.—There can be no doubt the evidence was receivable. It is like the case of a word written in a foreign language.] There is this difference, that a word in a foreign language, has a meaning to parties who understand the language, when these letters do not constitute any word, and are altogether insensible. [*Parke*, B.—You might say the same of the letters I.O.U.]

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Byles (with whom was *Kelly*), contra, was stopped by the Court.

PARKE, B.—I am of opinion that this rule must be made absolute. The question turns entirely on the meaning of the terms employed in this contract, whereby the parties agreed that a match should be run between their dogs "on the Wednesday during the Newmarket February meeting, 1841." Now it turns out that the Newmarket February meeting is in the nature of a moveable feast; not fixed definitively for a particular day, but dependent in some degree on circumstances. Here it was, in the first instance, fixed for the 2nd February; not positively, but *weather permitting*. The weather not permitting, the meeting did not then take place; and the usage appears to be,

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in such case, for the Newmarket Club to meet and adjourn it to some future day, with an understanding that the adjournment is in like manner to be—"weather permitting."

In short, the evidence goes to shew, that the day on which the Newmarket February meeting is to be held is altogether uncertain. Now it seems to me that the meaning of this contract is, that the parties have bargained that their dogs shall run on the Wednesday during that intended meeting; there is nothing in the contract indicating the precise day on which the match is to take place, but it is to be on the Wednesday during the February meeting, whatever Wednesday that may be. Mr. *Gunning* contends that the intention of the parties was, that the race should be run on the Wednesday in the week of the meeting as then fixed; but if that was their intention, the contract should have been differently worded, so as to specify Wednesday the 8rd of February then next ensuing; instead of which, they agree that the match should be run on the Wednesday during the Newmarket meeting; that is, as it may happen to be held. The attending on several occasions might no doubt be inconvenient to the defendant, but he should have provided against that by his contract; as it stands, both were bound to be ready with their dogs on the Wednesday during the February meeting, whenever it might be really held. For these reasons, I think that the learned Judge was mistaken, and that the rule must be absolute for a new trial.

ALDERSON, B.—I am of the same opinion, and am now satisfied that I took a wrong view of this contract at the trial, in construing it to mean the Wednesday in the week of the Newmarket February meeting, as then settled: if that had been the correct view of it, I should have been right, because as that meeting began on Tuesday the 2nd of February, the Wednesday for which the match was fixed would be a definite Wednesday, limited and ascer-

tained by the terms of the contract. But the expression really used is, "the Wednesday *during* the Newmarket February meeting;" and that must mean, that as the meeting commences on a Tuesday, the match shall come off on the Wednesday during the meeting in February at which the persons who frequent that meeting course their dogs; and the practice appears to be for these persons to meet on the Tuesday, and if Wednesday be not an open day, to adjourn to the first open Wednesday. I was wrong, therefore, in the construction I put upon the contract at the trial.

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GURNEY, B.—Both parties must have very well understood, although both were not members of the club, that coursing matches must depend upon the weather.

ROLFE, B., concurred.

Rule absolute.

The cause was tried again at the last Cambridgeshire Assizes, before *Tindal*, C. J. The same evidence was again given, but it appeared also that the Newmarket meetings were held under certain printed rules, and it was objected for the defendant that they ought to have been produced, and that in the absence of them there was no legitimate evidence whereby to construe the contract to apply to the adjourned meeting. The learned judge overruled this objection, and the plaintiff had a verdict, damages £100, leave being reserved to the defendant to move to enter a nonsuit.—In Easter Term (April 15),

Biggs Andrews moved accordingly.—The plaintiff ought to have produced the rule which authorized the adjournment of the meeting. Without it there was nothing to shew that the plaintiff was ready to run the match on the

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day alleged in the declaration, viz., the Wednesday during the February meeting. [*Parke, B.*—Suppose the meeting were actually fixed on a day contrary to the rules, is not that the time at which the match is to be run?] There is nothing to bind the defendant, who is a stranger to the club and its rules, to attend at any time but when the meeting was regularly held. The stewards of the club could only act under the written authority delegated to them by the rule, which therefore ought to have been produced and shewn to have been complied with. [*Parke, B.*—The agreement is that the match shall be run during the Newmarket meeting, and it was sufficient for the plaintiff to shew that he was ready at the time when the meeting was actually held. Even if the rules were violated, but by common consent the meeting was postponed to another week, that would be the time at which race was to be run.]

Secondly, this was a “dog-match,” and therefore illegal within the express terms of the 16 Car. 2, c. 7, s. 2. The question is, whether that illegality can be taken advantage of under the general issue. Here the illegality appears on the plaintiff's own case. [*Parke, B.*—*Fenwick v. Laycock* (a) is an authority that the illegality must nevertheless be pleaded.]

Thirdly, the declaration is bad in arrest of judgment, inasmuch as this was an illegal game within the stat. 9 Anne, c. 14, and therefore any contract arising out of it was void in law. He cited *Lynall v. Longbotham* (b), *Jeffreys v. Walter* (c), *Whaley v. Pajot* (d), *Young v. Moore* (e), *Brown v. Berkeley* (f).—On this point a rule was granted, against which

Byles now shewed cause.—This is a valid contract at

(a) 1 G. & D. 27.

(b) 2 Wils. 36.

(c) 1 Wils. 220.

(d) 2 Bos. & P. 51.

(e) 2 Wils. 67.

(f) Cowp. 281.

common law, as it is neither immoral nor contrary to public policy; and the question is, whether there is any provision in the statutes 16 Car. 2, c. 7, or 9 Anne, c. 14, to invalidate it; and it is incumbent on the defendant to shew that there is. The stat. 16 Car. 2, c. 7, was not levelled against gaming generally, but only against *deceitful* and *excessive* gaming. The title is, "An Act against deceitful, disorderly, and excessive Gaming." And the second section enacts, "that if any person or persons do or shall by any fraud, shift, cousenage, circumvention, deceit, or unlawful device or ill practice whatsoever, in playing at or with cards, dice, tables, &c., or by cock-fighting, horse-races, *dog-matches*, foot-races, or other pastimes, game or games whatsoever, or in or by bearing a share or part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play, act, ride, or run as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever, that then every person and persons so offending as aforesaid shall ipso facto forfeit and lose treble the sum or value of money or other thing so won, gained, obtained, or acquired." The word "*dog-matches*" in that section does not mean "*dog-races*:" coursing was not a diversion then known, as it is not alluded to in Strutt's Pastimes, but is of more recent introduction. Those "*dog-matches*" were fights between dogs, and with bulls and bears, which were then common. This clause, at all events, relates to deceitful gaming only, as appears also from the marginal note at the side of it. Here there is no imputation of any "fraud, shift, cousenage, circumvention, deceit, or unlawful device or ill practice." There are none of those words which do not ex vi termini import fraud or deceit. It applies also to cases where the sum of money or other thing is actually won, gained, obtained, or acquired.

Then the 3rd section was intended to prevent *excessive*

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gaming. It says "that if any person or persons shall at any time or times play at *any of the said games, or any other pastime, game or games whatsoever* (other than with and for ready money), or shall bet on the sides or hands of such as do or shall play thereat, and shall lose any sum or sums of money or other thing or things so played for, exceeding the sum of £100 at any one time or meeting, upon ticket or credit, or otherwise, and shall not pay down the same at the time when he or they shall so lose the same, the party and parties who loseth or shall lose the said monies, or other thing or things, so played or to be played for, above the said sum of £100, shall not in that case be bound or compelled or compellable to pay or make good the same, but the contract and contracts for the same, and all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds, and securities whatsoever, which shall be obtained, made, given, acknowledged, or entered into for security or satisfaction of or for the same, or any part thereof, shall be utterly void and of none effect;" and it goes on to provide, that the person so winning above the sum of £100, shall forfeit treble the value of the sum so won. The statute says, therefore, first, that a person shall not win anything *fraudulently*; and secondly, that he shall not win more than £100 *in any way*, or the contract shall be void. This case falls within neither of those provisions. There is here no deceitful gaming, nor for more than £100. Then the stat. 9 Anne, c. 14, has this title,—“An Act for the better preventing of excessive and deceitful gaming;” and it recites that “the laws now in force for preventing the mischiefs which may happen by gaming, have not been found sufficient for that purpose;” and the 1st section enacts “that all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, or entered into or executed by any person or persons whatsoever, where the

whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent and advanced at the time and place of such play, to any person or persons so gaming or betting as aforesaid, or that shall, during such play, so play or bet, shall be utterly void." That section is clearly inapplicable; for here there has been no play, nor is this a contract in writing to secure the amount of money won at play. The act provides that certain written securities given for that purpose shall be void; and even assuming a dog-race to be a game within that statute, this contract is not void, as it does not extend to parol contracts. That was expressly held in *Robinson v. Bland* (a), and *Barjeau v. Walmsley* (b). In the former case, Lord Mansfield, C. J., puts it on the ground "that the legislature meant only to avoid the *security*, not the *contract*;" and says that it had been twice judicially determined, in *Slater v. Emerson*, coram *Eyre*, C. J., and *Barjeau v. Walmsley*. So that there are three distinct decisions that the stat. 9 Ann. only applies to written securities. In *Young v. Moore* (c), a defendant, who had been arrested for money won at play, was discharged out of custody on entering a common appearance: but that case arose only incidentally, and proceeded on the 2nd section of the stat. of Anne, and only part of the Court were present, the Chief Justice and *Noel*, J., being absent. [Lord Abinger, C. B.—Suppose the statute makes the securities void only; how is that consistent with allowing the monies to be recovered back?]

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(a) 1 Sir W. Bl. 260; 2 Burr. 1077.

(b) 2 Stra. 1249.

(c) 2 Wils. 67.

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It is under the 2d section, and not under the 1st, that the money may be recovered back, and this case is not within the 2nd section. [Lord *Abinger*, C. B.—The consequence of holding that the statute does not extend to parol contracts would be, that if no security were taken, money may be lent to any extent to play with.] No; the 2d section gives a popular action to recover the money, if the person losing the money does not sue for it within the time limited. Two mischiefs were intended to be provided against by that statute; one, that where a party loses money at play, and a security is given, he shall not be obliged to pay the money he so loses: the other, that the person betting shall not recover his bet if it exceeds £10. The distinction is between bets above and under £10. [Lord *Abinger*, C. B.—These statutes, you say, do not make all betting illegal, but only betting on matters of chance.] In *Shillito v. Theed* (a), it was held that the plaintiff could not recover on a bill given in payment of a bet above £10, lost at a legal horse-race; but the Court there proceeded on the ground that a wager not exceeding £10 was legal, and might be recovered. If there is no written security, the first section does not apply, and nothing under £10 is within the 2nd; if the game be an illegal one, then all bets are void; if a legal one, bets under £10 are valid. *Bones v. Booth* (b), *M'Allester v. Haden* (c). Suppose a match at cricket, which is within the statute, and a bet under £10, that bet may be recovered. *Hodson v. Terrill* (d). In that case, the reason for holding the bet on a cricket-match to be illegal and void was, that the bet was for £20, and therefore above the amount allowed.

Then as to the 2nd section, it enacts, “that any person or persons whatsoever, who shall at any time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or by betting on the sides or hands of such as

(a) 7 Bing. 405.

(b) 2 W. Bl. 1725.

(c) 2 Camp. 438.

(d) 1 C. & M. 767.

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do play at any of the games aforesaid, lose to any one or more person or persons so playing or betting, in the whole the sum or value of £10, and shall pay or deliver the same or any part thereof, the person or persons so losing and paying, or delivering the same, shall be at liberty within three month then next to sue for and recover the money or goods so lost, and paid or delivered, or any part thereof, from the respective winner or winners thereof, with costs of suit, &c." That section does not make the gaming void or the receipt of the money illegal, but merely gives a remedy to recover it back. This is not a case within that section. The money was not to be lost or won at one time or sitting: the determination of the wager was to be by the best of three courses. [*Alderson, B.*—The meaning of one time or sitting is, one event. It is like a rubber of whist, where the parties succeed who gain the best out of three games; but there the rubber is one event.] But supposing this race, if actually run, to be within the act, there was no race; there was no "playing" within the meaning of the 2nd section; for no match was run. [*Alderson, B.*—Is it not illegal to contract to run a match which, if run, will be illegal within the 2nd section?] There is nothing in the 2nd section to make the contract illegal. That section is more extensive than the first. [*Alderson, B.*—Can a contract which, if carried out, could not be enforced, be enforced so far as to make a contracting party pay for not carrying it out?] Not if it be illegal. But if the 2nd section only extends to make the money recoverable if the game be played, how can that prevent a man from recovering another sum agreed to be paid if the game be not played? There is no express prohibition of the contract; only a certain condition annexed to it, that if the game be played, and money won under it above £10, the money shall be paid back. But the money claimed here is not that money, but other money agreed to be paid if the match be not run. [*Alderson, B.*—Is not

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the sum to be paid in case the match was run and lost, the same sum which was to be paid in case the match was not run?] No; the sums are not treated as the same in the declaration. It states that whichever greyhound should be the best in the three courses, he should be deemed the winner, and the owner of the said greyhound should receive from the owner of the other greyhound the sum of £100; and it afterwards states that the said sum of £100 should be forfeited by either party who should make default in causing his greyhound not to run the said match, which said sum should be paid to the other party who should be ready to run his greyhound. [*Alderson, B.*—Surely that comes to the same thing as “play or pay.”] Lastly, this is not a game within the statute. Suppose two greyhounds are running after a hare, and a bet is made upon one of them catching her, is that a bet upon persons “playing” at a game within the act? It is submitted that it clearly is not.

Biggs Andrews, and *Bere*, in support of the rule, were stopped by the Court.

LORD ABINGER, C. B.—We need not hear counsel in support of this rule, as we are all of opinion that it ought to be made absolute. The stat. 16 Car. 2, c. 7, s. 3, provides that “if any person or persons shall at any time or times play at any of the said games” (being the games enumerated in the second section), “or any other pastime, game or games whatsoever (other than with and for ready money), or shall bet on the sides or hands of such as do or shall play thereat, and shall lose any sum or sums of money, or other thing or things so played for, exceeding the sum of £100, at any one time or meeting, upon ticket or credit, or otherwise, and shall not pay down the same at the time when he or they shall so lose the same, the party and parties who loseth or shall lose the said monies or other thing or things so played, or to be played for, above

the said sum of £100, shall not, in that case, be bound or compelled or compellable to pay or make good the same; but the contract and contracts for the same, &c., shall be utterly void and of none effect." The statute of Anne reduces the amount from £100 to £10, leaving the law, in other respects, as it stood before, and though that statute does not specify all the different games mentioned in the preceding act, yet it contains the comprehensive words, "other game or games whatsoever," which have been very properly held to include horse and foot races, and other matches of a similar nature. I think dog matches, like the present, stand upon the same footing with them, and I can see no reason for holding that they are not included. This being a game, therefore, within the provisions of that statute, and the stake depending upon its issue exceeding £10, the question arises whether this was not a contract binding a party to do an act which the 2nd section of the 9 Anne renders penal. The very object of the contract was to make the defendant pay that bet which, being for a sum of above £10, the act intended to prohibit, and consequently rendered illegal. That being so, it is a contract which cannot be enforced; and this rule must therefore be made absolute.

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GURNEY, B., concurred.

ROLFE, B.—I am of the same opinion. In the course of the argument, I was much struck by some of the very ingenious observations made by Mr. *Byles*, but upon reference to the 5th section of the 9th Anne, c. 14, all doubt was removed from my mind. That section provides, "That if any person or persons whatsoever, at any time or times, do or shall by any fraud or shift, cosenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at or with cards, dice, or any of the games aforesaid, or in or by bearing a share or part in the

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stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, *any sum or sums of money*; or other valuable thing or things whatsoever, or shall at any one time or sitting win of any one or more person or persons whatsoever *above the sum or value of £10*, that then every person or persons so winning by such ill practice as aforesaid, or winning at any one time or sitting above the said sum or value of £10, and being convicted of any of the said offences, upon an indictment or information to be exhibited against him or them for that purpose, shall forfeit five times the value of the sum or sums of money, or other thing so won as aforesaid, and *in case of such ill practice* as aforesaid shall be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury." Assuming Mr. *Byles's* interpretation of the statute of Charles to be correct, still if a dog-race is within the words of that act, and one of the games referred to in this fifth section of the statute of Anne, we find a clear distinction pointed out by the latter between fraudulent play and playing to the amount of £10. In the one case the party who shall win any money, &c., by fraud is made subject to an indictment, to forfeit five times the value of the money won, and be subject to corporal punishment; in the other, the person who shall win at any one time more than £10, without any fraud, is only to forfeit five times the amount. I am, therefore, clearly of opinion that to receive more than £10 on the result of a dog-match is illegal; and the object of this contract being to compel one or other of the parties to do so, I think it is an illegal contract, and cannot be enforced.

Lord ABINGER, C. B., added that *Alderson*, B., who had left the Court before the conclusion of the argument, entirely concurred in the judgment they had just given.

Rule absolute.

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June 6.

RISELEY v. RYLE, Esq.

CASE against the Sheriff of Cheshire, on the stat. 8 Anne, c. 14, s. 1.—The declaration stated, that whereas heretofore, to wit, on the 25th December 1841, and for a long space of time then last past, to wit, for the space of five years, one J. Knott and one W. Knott occupied a certain brewery, dwelling-house, and appurtenances, as tenants thereof to the plaintiff, at a certain rent theretofore payable by the said J. Knott and W. Knott to the plaintiff for the same. It then alleged that the sum of £250, for one year's rent ending on the day and year aforesaid, was due and in arrear, and that the defendant, being sheriff of the county of Chester, by virtue of a writ of *fi. fa.* issued against the said J. Knott and W. Knott, together with one C. Knott, at the suit of one John Jackson, directed to the sheriff of Cheshire, "took certain goods and chattels *then* lying and being in and upon the said brewery, dwelling-house, and appurtenances; *so in the tenure and occupation* of the said J. Knott and W. Knott as aforesaid, of great value, &c."—The declaration then averred notice to the sheriff, before the removal of the goods, of the rent being due to the plaintiff, and request of payment thereof, and alleged as a breach that the defendant wrongfully carried away the goods, without paying or satisfying the plaintiff the said arrears of rent, &c., &c.

Special demurrer, assigning for causes, that no cause of action appears on the face of the declaration, inasmuch as it is not stated, nor does it appear therein, that any tenancy was subsisting between the plaintiff and the said J. Knott and W. Knott of the said brewery, &c., either at the time when the said goods and chattels are said to have been taken by the defendant under the *fi. fa.*, or at the time of the removal of the same; nor does it appear that the said J. Knott and W. Knott were, or that either of them was,

A declaration in case against the sheriff, on the stat. 8 Anne, c. 14, for removing goods seized under a *fi. fa.* without payment of arrears of rent due to the plaintiff, must shew distinctly that the tenancy in the premises subsisted at the time of the seizure of the goods: and this is not sufficiently averred by a statement, that the debtor heretofore, to wit, on &c., and for a long space of time then past, occupied certain premises as tenant thereof to the plaintiff, and that the defendant took certain goods "then lying and being in and upon the premises, so in the tenure and occupancy of" the debtor as aforesaid.

Exch. of Pleas, in possession of the said premises, or any part thereof, at the time of the said taking or removal. — Joinder in demurrer.

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Atkinson appeared in support of the demurrer, but the Court called upon

Crompton, contra.—The words “*then lying and being in and upon the said brewery, &c., so in the tenure and occupation of the said J. Knott and W. Knott as aforesaid,*” sufficiently shew that the tenancy and the occupation subsisted at the time of the taking. The words “*so in the tenure,*” &c., mean, so being at the last antecedent period, which is the time of the seizure. This form of declaration has been invariably adopted, and is the only precedent to be found in the books (*a*).

PER CURIAM.—We think you had better amend.

Leave to amend on payment of costs, otherwise
Judgment for the defendant.

(*a*) 2 Chit. Pl. 586 ; 8 Went. 445.

June 6.

PHILLIPS and Others v. CLAGGETT.

In an action on the case against a bailee of goods delivered to him for reward by the plaintiff, containing some counts charging a misuser of the goods, whereby they were lost to the plaintiff, and other counts in trover, the defendant cannot plead generally in abatement, that they were the goods of the plaintiffs and other persons.

IN this case the declaration contained ten counts. The first five were in trover, for certain hogsheads of tobacco : the other five set forth, that the plaintiffs having employed the defendant at his request, for certain reasonable reward,

A plea in abatement for the misjoinder of parties, pleaded to several counts, if bad as to any of them, is bad altogether, and there must be a general judgment of respondeat ouster ; although it would have been good if pleaded separately to the other counts.

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in the capacity of an agent or factor, to receive and take into his possession certain hogsheads of tobacco belonging to the plaintiffs, the defendant misconducted himself, after the receipt thereof, in and about the care and disposal of the same, and by reason of such misconduct they became and were wholly lost to the plaintiffs. The defendant pleaded in abatement, to the whole declaration, that the goods therein mentioned were not the property of the plaintiffs only, but were the joint property of the plaintiffs and two other persons. To this plea the plaintiffs demurred, and the defendant joined in demurrer.

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Crompton, in support of the demurrer, was stopped by the Court.

Kelly, *contrà*.—The last five counts of the declaration are not founded upon a contract, but upon a supposed duty resulting from a contract. The grievance complained of in those counts is the misuser of the goods by the defendant, contrary to his duty. This, therefore, is not an action of contract, but of tort; and the plaintiffs having chosen to adopt that form of action, have subjected themselves to the consequences of doing so; one of which is, that a plea in abatement, for the nonjoinder of the other persons interested in the goods, may be pleaded: *Addison v. Overend* (a). Although the *contract* was made with the plaintiffs alone, any other persons who had an interest in the goods might make the same complaint against the defendant in an action *ex delicto*, and therefore the only way in which he can protect himself against a multiplicity of actions, and from paying the value of the goods several times over, is by a plea in abatement. It would be no defence to this action to shew at the trial that the goods belonged to other persons besides the plaintiffs; whereas if they had sued in

(a) 6 T. R. 766.

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assumpsit, they would have been defeated on the general issue. At any rate, the plea is good as to the first five counts, and the writ must be abated and quashed as to that part. The case of *Powell v. Fullerton* (a) is an authority to shew that this may be done.

Crompton, for the plaintiffs, referred to *Herries v. Jamieson* (b).

LORD ABINGER, C. B.—This is a perfectly clear case. If the defendant had pleaded separately to the first five counts, that other parties besides the plaintiffs had an interest in the goods, that plea might have been good; but this plea in abatement is no answer at all to the other counts of the declaration, and which are framed upon contracts which the defendant admits himself to have made with the plaintiffs alone. It is urged, however, that we may take the plea distributively, and quash the writ as to the first five counts, and award a judgment of respondeat ouster as to the residue. Pleas in abatement are never favoured by the Court; and I think that such a plea, if bad as to part, is bad as to the whole. The case of *Powell v. Fullerton* has been cited as an authority to the contrary, but that is clearly distinguishable: for there the plea was not pleaded to the whole declaration, but to a part of it only, although it improperly prayed judgment of the whole writ; but that was a mere irregularity, which did not vitiate the plea altogether. I am clearly of opinion that we cannot give our judgment as to part of the plea, and another judgment as to the residue, but there must be one general judgment of respondeat ouster.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Judgment of respondeat ouster.

(a) 2 Bos. & P. 420.

(b) 5 T. R. 553.

BURTON v. HENSON and KESBEY.

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THIS was an action of assault, to which the defendants pleaded not guilty by statute.

At the trial before *Gurney, B.*, at the last assizes at Chelmsford, it appeared that the defendants were the churchwardens of the parish of Northweald Bassett, in the county of Essex, and that the plaintiff had been appointed clerk of the same parish in 1806. He had continued to fill that office till the 1st July, 1841, when he was dismissed by the vicar under the following circumstances:—He had originally been appointed at an annual salary of 5*l.* 5*s.*; but this having been reduced, high words had ensued between the plaintiff, the churchwardens, and the vicar; and although he officiated at the clerk's desk during the sacrament, the plaintiff declined to receive it, as he was on bad terms with these parties. An application having subsequently been made to the Bishop of London by the vicar, on the 15th June, 1841, the plaintiff was prevailed upon to sign an apology for his absence and his disrespectful expressions, with a promise of more becoming demeanour for the future. A few days afterwards, in a conversation with the parish schoolmaster respecting the terms of this document, and in answer to an observation made by the latter, that the vicar had said he had read it to the plaintiff as loud as ever he read a lesson, the plaintiff said, that if he said so he was a liar. The vicar, for this expression, dismissed him without summons, and one Holly was appointed in his place; and on Sunday, the 25th July, when the church doors were opened for divine service, and the parishioners were assembling, the plaintiff came into the church, and proceeding to the clerk's seat, which was then occupied by Holly, attempted to enter it by the door, but was prevented from so doing by one of the rural police of the name of Pelby placing his back against the door. The de-

A parish clerk having been dismissed from his office by the rector, though irregularly, and another appointed, the former entered the church before divine service had commenced, and took possession of the clerk's seat:—*Held*, that the churchwardens were justified in removing him from the clerk's desk, and also out of the church, if they had reasonable grounds for believing that he would offer interruption during the celebration of divine service.

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defendants thereupon desired him not to take this seat, but the plaintiff immediately entered an adjoining pew, and thence climbed over into the clerk's desk and took his seat there. The defendants then desired Pelby to remove him, which he did by force, and led him out of the church. Shortly after the service had commenced, however, he returned, and again attempted to enter the seat; but upon some communication being made to him by the defendants, he left the church. This forcible removal from the clerk's seat was the assault complained of. These facts having been proved at the trial, the learned Judge was of opinion that the dismissal was illegal, and therefore the plaintiff was entitled to a verdict, which the jury accordingly found for him, with one farthing damages. Leave was however reserved to the defendants to move to enter a verdict, if the Court should be of opinion, either that the removal was lawful, or that, under the circumstances, a dismissal *de facto* was sufficient to justify what the defendants had done.—*Thesiger* having, in Easter Term, obtained a rule accordingly,

Peacock (and *Shee*, Serjt., was with him) shewed cause.—The learned Judge's direction was correct. The plaintiff having been appointed parish clerk, was in office for life, or as long as he behaved himself properly, and until he was legally dismissed. The churchwardens, therefore, had no right to turn him out as long as he continued *de facto* clerk. [*Gurney*, B.—The question is whether the clerk was justified in asserting his right in this indecent manner, and whether the churchwardens had not a right to remove him, under such circumstances.] The clergyman had improperly dismissed him, and therefore he had a right to occupy the desk appropriated to the use of the clerk. [*Alderson*, B.—There are authorities to shew that the churchwardens have the power to regulate the seats; here, in defiance of them, the plaintiff climbed over into the desk.] The desk is the proper and peculiar place for the clerk; it is especially set

apart for him, and differs from other seats. [Lord Abinger, C. B.—It is difficult to say that the churchwardens were not authorized to interfere. They could know nothing but that the minister had in fact dismissed him from the office. In the case of a dispute about a pew, the course is to try it by due course of law. Is a person to try such a right by insisting upon sitting there? And if he finds another person there, and attempts to enter, cannot the churchwardens interfere? The plaintiff would be in no way injured by being prevented from resorting to such an assertion of his title as this, for he may bring an action for money had and received.] Although he might maintain such an action, it does not necessarily follow that he may not assert his right in this manner. He holds his seat *virtute officii*, which distinguishes it from the ordinary case of a pew. Besides, even supposing the defendants were justified in removing him from the pew, they had no right to remove him from the church. Perhaps they might have been justified in taking him out of the church if the interruption had taken place during the performance of divine service: but this took place before divine service had commenced. Unless he was creating a disturbance during the service, they had no right to remove him.

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Thesiger, in support of the rule, was stopped by the Court, but in the course of the argument referred to *Reynolds v. Monkton* (a), where it was held by *Rolfe*, B., that churchwardens have a discretionary power to appropriate pews in the church amongst the parishioners, and might remove persons intruding on seats already appropriated.

LORD ABINGER, C. B.—We think it makes no difference whether the service had actually begun, or was only about to begin, so long as the conduct of the plaintiff was such

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as to lead the churchwardens reasonably to suppose that he would offer interruption to the service. The evidence shews that he was likely to create a disturbance. The question is whether the removal from the church was not at the time a fair exercise of judgment, that if they did not remove him he would create a disturbance. We think it was, and the jury seem to have been of the same opinion in awarding a farthing damages.

ALDERSON, B.—In Hawkins's Pleas of the Crown, Book 1, c. 63, s. 29, it is laid down that "churchwardens, and perhaps, private persons, may whip boys playing in church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay hands on those who disturb the performance of any part of divine service, and turn them out of the church." For these positions he quotes 1 Saund. 18, 1 Sid. 301, 8 Keble, 124, and 1 Mod. 168. *Hawe v. Planner* (a) is likewise an authority to shew that churchwardens may interfere to preserve decorum in the church. Here the congregation were assembling for divine service, and the defendants only did what was necessary to guard against interruption, and a most unseemly exhibition during its progress; that they were fully entitled to do.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

(a) 1 Saund. 13; 1 Sid. 301. See also Rogers on Ecclesiastical Law, 229.

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June 6.

WINTERBOTTOM v. WRIGHT.

CASE.—The declaration stated, that the defendant was a contractor for the supply of mail-coaches, and had in that character contracted for hire and reward with the Postmaster-General, to provide the mail-coach for the purpose of conveying the mail-bags from Hartford, in the county of Chester, to Holyhead: That the defendant, under and by virtue of the said contract, had agreed with the said Postmaster-General that the said mail-coach should, during the said contract, be kept in a fit, proper, safe, and secure state and condition for the said purpose, and took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach; and it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition for the purpose aforesaid: That Nathaniel Atkinson and other persons, having notice of the said contract, were under contract with the Postmaster-General to convey the said mail-coach from Hartford to Holyhead, and to supply horses and coachmen for that purpose, and also, not on any pretence whatever, to use or employ any other coach or carriage whatever than such as should be so provided, directed, and appointed by the Postmaster-General: That the plaintiff, being a mail-coachman, and thereby obtaining his livelihood, and whilst the said several contracts were in force, having notice thereof, and trusting to and confiding in the contract made between the defendant and the Postmaster-General, and believing that the said coach was in a fit, safe, secure, and proper state and condition for the purpose aforesaid, and not knowing and having no means of knowing to the contrary thereof, hired himself to the said Nathaniel Atkinson and

A. contracted with the Postmaster-General to provide a mail-coach to convey the mail bags along a certain line of road; and B. and others also contracted to horse the coach along the same line. B. and his co-contractors hired C. to drive the coach: —*Held*, that C. could not maintain an action against A. for an injury sustained by him while driving the coach, by its breaking down from latent defects in its construction.

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his co-contractors as mail-coachman, to drive and take the conduct of the said mail-coach, which but for the said contract of the defendant he would not have done. The declaration then averred, that the defendant so improperly and negligently conducted himself, and so utterly disregarded his aforesaid contract, and so wholly neglected and failed to perform his duty in this behalf, that heretofore, to wit, on the 8th of August, 1840, whilst the plaintiff, as such mail-coachman so hired, was driving the said mail-coach from Hartford to Holyhead, the same coach, being a mail-coach found and provided by the defendant under his said contract, and the defendant then acting under his said contract, and having the means of knowing and then well knowing all the aforesaid premises, the said mail-coach being then in a frail, weak, infirm, and dangerous state and condition, to wit, by and through certain latent defects in the state and condition thereof, and unsafe and unfit for the use and purpose aforesaid, and from no other cause, circumstance, matter or thing whatsoever, gave way and broke down, whereby the plaintiff was thrown from his seat, and in consequence of injuries then received, had become lamed for life.

To this declaration the defendant pleaded several pleas, to two of which there were demurrers; but as the Court gave no opinion as to their validity, it is not necessary to state them.)

Peacock, who appeared in support of the demurrers, having argued against the sufficiency of the pleas,—

Byles, for the defendant, objected that the declaration was bad in substance.—This is an action brought, not against Atkinson and his co-contractors, who were the employers of the plaintiff, but against the person employed by the Postmaster-General, and totally unconnected with them or with the plaintiff. Now it is a general rule, that

wherever a wrong arises merely out of the breach of a contract, which is the case on the face of this declaration, whether the form in which the action is conceived be ex contractu or ex delicto, the party who made the contract alone can sue: *Tollit v. Sherstone* (a). If the rule were otherwise, and privity of contract were not requisite, there would be no limit to such actions. If the plaintiff may, as in this case, run through the length of three contracts, he may run through any number or series of them; and the most alarming consequences would follow the adoption of such a principle. For example, every one of the sufferers by such an accident as that which recently happened on the Versailles railway, might have his action against the manufacturer of the defective axle. So, if the chain-cable of an East Indiaman were to break, and the vessel went aground, every person affected, either in person or property, by the accident, might have an action against the manufacturer, and perhaps against every seller also of the iron. Again, suppose a gentleman's coachman were injured by the breaking down of his carriage, if this action be maintainable, he might bring his action against the smith or the coachmaker, although he could not sue his master, who is the party contracting with him: *Priestly v. Fowler* (b). There is no precedent to be found of such a declaration, except one in 8 Wentworth, 397, which has been deemed very questionable. *Rapson v. Cubitt* (c) is an authority to shew that the party injured by the negligence of another cannot go beyond the party who did the injury, unless he can establish that the latter stood in the relation of a servant to the party sued. In *Witte v. Hague* (d), where the plaintiff sued for an injury produced by the explosion of a steam-engine boiler, the defendant was personally present managing the boiler at the time of the ac-

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(a) 5 M. & W. 283.

(b) 3 M. & W. 1.

(c) 9 M. & W. 710.

(d) 2 Dowl. & Ry. 33.

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cident. *Levy v. Langridge* (a) will probably be referred to on the other side. But that case was expressly decided on the ground that the defendant, who sold the gun by which the plaintiff was injured, although he did not personally contract with the plaintiff, who was a minor, knew that it was bought to be used by him. Here there is no allegation that the defendant knew that the coach was to be driven by the plaintiff. There, moreover, *fraud* was alleged in the declaration, and found by the jury: and there, too, the cause of injury was a weapon of a dangerous nature, and the defendant was alleged to have had notice of the defect in its construction. Nothing of that sort appears upon this declaration.

Peacock, contra.—This case is within the principle of the decision in *Levy v. Langridge*. Here the defendant entered into a contract with a public officer to supply an article which, if imperfectly constructed, was necessarily dangerous, and which, from its nature and the use for which it was destined, was necessarily to be driven by a coachman. That is sufficient to bring the case within the rule established by *Levy v. Langridge*. In that case the contract made by the father of the plaintiff with the defendant was made on behalf of himself and his family generally, and there was nothing to shew that the defendant was aware even of the existence of the particular son who was injured. Suppose a party made a contract with government for a supply of muskets, one of which, from its misconstruction, burst and injured a soldier: there it is clear that the use of the weapon *by a soldier* would have been contemplated, although not by the particular individual who received the injury, and could it be said, since the decision in *Levy v. Langridge*, that he could not maintain an action against the contractor? So, if a coachmaker,

(a) 4 M. & W. 337.

employed to put on the wheels of a carriage, did it so negligently that one of them flew off, and a child of the owner were thereby injured, the damage being the natural and immediate consequence of his negligence, he would surely be responsible. So, if a party entered into a contract to repair a church, a workhouse, or other public building, and did it so insufficiently that a person attending the former, or a pauper in the latter, were injured by the falling of a stone, he could not maintain an action against any other person than the contractor; but against him he must surely have a remedy. It is like the case of a contractor who negligently leaves open a sewer, whereby a person passing along the street is injured. It is clear that no action could be maintained against the Postmaster-General: *Hall v. Smith* (a), *Humphreys v. Mears* (b), *Priestley v. Fowler*. But here the declaration alleges the accident to have happened through the defendant's negligence and want of care. The plaintiff had no opportunity of seeing that the carriage was sound and secure. [*Alderson*, B.—The decision in *Levy v. Langridge* proceeds upon the ground of the knowledge and fraud of the defendant.] Here also there was fraud: the defendant represented the coach to be in a proper state for use, and whether he represented that which was false within his knowledge, or a fact as true which he did not know to be so, it was equally a fraud in point of law, for which he is responsible.

Lord ABINGER, C. B.—I am clearly of opinion that the defendant is entitled to our judgment. We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions. This is an action of the first impression, and it has been brought in spite of the precautions which were taken, in the judgment of this Court in the case of *Levy v. Langridge*, to obviate any notion that such an action

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(a) 2 Bing. 156.

(b) 1 Man. & R. 187.

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could be maintained. We ought not to attempt to extend the principle of that decision, which, although it has been cited in support of this action, wholly fails as an authority in its favour; for there the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really and substantially the party contracting. Here the action is brought simply because the defendant was a contractor with a third person; and it is contended that thereupon he became liable to every body who might use the carriage. If there had been any ground for such an action, there certainly would have been some precedent of it; but with the exception of actions against innkeepers, and some few other persons, no case of a similar nature has occurred in practice. That is a strong circumstance, and is of itself a great authority against its maintenance. It is however contended, that this contract being made on the behalf of the public by the Postmaster-General, no action could be maintained against him, and therefore the plaintiff must have a remedy against the defendant. But that is by no means a necessary consequence—he may be remediless altogether. There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. [Where a party becomes responsible to the public, by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or agent. So, in cases of public nuisances, whether the act was done by the party as a servant, or in any other capacity, you are liable to an action at the suit of any person who suffers. Those, however, are cases where the real ground of the liability is the public duty, or the commis-

sion of the public nuisance. There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract. Thus, a carrier may be sued either in assumpsit or case; but there is no instance in which a party, who was not privy to the contract entered into with him, can maintain any such action.] The plaintiff in this case could not have brought an action on the contract; if he could have done so, what would have been his situation, supposing the Postmaster-General had released the defendant? that would, at all events, have defeated his claim altogether. By permitting this action, we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him.

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ALDERSON, B.—I am of the same opinion. The contract in this case was made with the Postmaster-General alone; and the case is just the same as if he had come to the defendant and ordered a carriage, and handed it at once over to Atkinson. If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty. The only real argument in favour of the action is, that this is a case of hardship; but that might have been obviated, if the plaintiff had made himself a party to the contract. Then it is urged that it falls within the principle of the case of *Levy v. Langridge*. But the principle of that case was simply this, that the father having bought the gun for

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the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it. There a distinct fraud was committed on the plaintiff; the falsehood of the representation was also alleged to have been within the knowledge of the defendant who made it, and he was properly held liable for the consequences. How are the facts of that case applicable to those of the present? Where is the allegation of misrepresentation or fraud in this declaration? It shews nothing of the kind. Our judgment must therefore be for the defendant.

GURNEY, B., concurred.

ROLFE, B.—The breach of the defendant's duty, stated in this declaration, is his omission to keep the carriage in a safe condition; and when we examine the mode in which that duty is alleged to have arisen, we find a statement that the defendant took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach, and, during all the time aforesaid, it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition. The duty, therefore, is shewn to have arisen solely from the contract; and the fallacy consists in the use of that word "duty." If a duty to the Postmaster-General be meant, that is true; but if a duty to the plaintiff be intended (and in that sense the word is evidently used), there was none. This is one of those unfortunate cases in which there certainly has been *damnum*, but it is *damnum absque injuriâ*; it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law.

Judgment for the defendant.

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June 9.

The ATTORNEY-GENERAL v. DONALDSON and Others.

THIS was an information of intrusion. The information stated, that whereas heretofore, to wit, on &c., a certain messuage or dwelling-house, situate and being in the parish of St. Margaret, within the liberty of Westminster, in the county of Middlesex, and parcel of the Royal Palace at Kensington, long before then, and at that time *in the occupation of our Lady the Queen*, was, and ought to have been, and of right is, or ought to be, in the hands and possession of our said Lady Queen Victoria, as in right of her crown of Great Britain and Ireland : yet the defendants heretofore, to wit, on &c., with force and arms, in and upon the possession of our said Lady the Queen, of and in the premises aforesaid, entered, intruded, and made entry, and remained and continued thereon for a long time, to wit, &c.

Plea, that the trespasses in the information mentioned were committed by the defendants under the authority of a certain commission of sewers of our said sovereign lady the now Queen, before and at the said times when &c., being in full force, for tax assessed by the said commission, and according to the tenor and effect, true intent and meaning, of the several statutes of sewers made and then and now in force. Verification.

Demurrer. The following were the points of demurrer stated on the part of the Attorney-General. First, that the Queen is not bound by the statute of sewers, so far as the same points out the mode of pleading. Second, that the plea should have set out specially the whole of the grounds upon which the defendants' justification depends.

An information of intrusion stated, that the defendants intruded and made entry on a certain messuage or dwelling-house, situate &c., and being parcel of the royal palace of Kensington, then *in the occupation of our Lady the Queen*, and which was in the hands and possession of the Queen in right of her Crown. The defendants pleaded, in the form given by the stat. 23 Hen. 8, c. 5, s. 11, that they committed the trespasses under the authority of a commission of sewers, for tax assessed by the said commission :—*Held*, on demurrer, that this form of plea was not allowable in an information of intrusion at the suit of the Crown.

A distress cannot be levied for sewers' rates within the precincts of a royal palace, occupied as the residence of the

Sovereign ; and Kensington Palace is within this description.

But *semble*, that the averment in this information did not sufficiently show the palace to be the residence of the Sovereign.

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Third, that the plea should have set forth more definitely the commission of sewers, and the assessment under it.

The case was argued in Easter Term (April 26), by

The *Attorney-General* for the Crown.—Two questions arise in this case: the first one of considerable importance, whether a royal palace, in the occupation of the sovereign, is within the statute of sewers, and liable to be rated for the sewers' tax: the second, whether the defendants, in an information of intrusion at the suit of the Crown, are at liberty to plead the general form of plea given by the Statute of Sewers, 23 Hen. 8, c. 5, s. 11.

With respect to the first point, it is impossible that a rate can be levied on a palace *in the occupation* of the sovereign. And in the case of *Winter v. Miles* (a), it was held that Kensington Palace, being kept in a constant state of preparation to receive the king, with his officers, servants, and guards residing and doing duty there at all times, and some of the royal family having apartments there (all which circumstances still exist with respect to it), was privileged as a royal palace against the intrusion of the sheriff for the purpose of executing process against the goods of a person having the use of apartments therein. There Lord *Ellenborough* says—"If his Majesty were neither actually nor *virtually* present at Kensington, neither in his royal person nor by his officers, domestics, or any of his family, it would be difficult to say that such a place was entitled to the privileges of a royal palace So long, however, as the emblems and ensigns of the kingly dignity are preserved in such palace, and the apartments exclusively appropriated to his use are, by his immediate servants, kept ready and in a fit condition to receive him at any time, whilst others are kept in like manner for the use of his officers, and some are immediately occupied by his Majesty's sons; and

(a) 10 East, 578.

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no such use made of the rest of the palace as to preclude or materially interrupt his Majesty's return to it whenever he might choose to do so; his Majesty, we think, may be considered as virtually residing there; . . . and that a palace thus in all respects circumstanced may be considered as a place exempt and privileged from the execution and service of the ordinary process of the law." *Netherton v. Ward (a)* will be cited for the defendants. There it was held that a tenement situate in the king's dock-yard, deriving a benefit from the public sewers, and occupied by an officer of government, who paid no rent, was liable to be rated to the sewers' rate. But that case is altogether distinguishable from the present. It was decided upon the provisions of the stat. 23 Hen. 8, c. 5, s. 9, which enacts in express terms, "that the same laws, ordinances and decrees to be made and ordained by the commissioners, shall bind as well the lands, tenements, and hereditaments of the king our sovereign lord, as all other persons and their heirs, for such their interest as they shall fortune to have in any lands," &c.; and the 3 & 4 Edw. 6, c. 8, which enacts, "that all scots, lots, and sums of money hereafter to be rated and taxed by virtue of such commission of sewers, upon any the lands, &c. of our sovereign lord the king, for any manner or thing concerning the articles of the said commission of sewers, shall be levied by distress." That was the case of crown property applied by the crown to public purposes, and held by a subject under the crown, not of property in the occupation of the sovereign himself. The crown occupies in its public capacity, and no *beneficial occupation* can be supposed to be enjoyed by it.

Secondly, the defendants are not entitled to plead the general plea given by the statute. The 23 Hen. 8, c. 5, s. 11, enacts, "that if any *action of trespass*, or other suit, shall happen to be attempted against any person or persons

(a) 3 B. & Ald. 21.

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for taking any distress, or any other act doing, by authority of the said commission, &c., the defendant or defendants in any such action shall and may make avowry, cognizance, or justification, alleging in such avowry, &c. that the said distress, trespass, or other act was done by the authority of the commission of sewers, for lot or tax assessed by the said commission," &c. An information of intrusion cannot be considered an "action of trespass or other suit" within the meaning of this clause. It clearly refers to a suit between subject and subject. If the 11th section be held applicable, so also must the 12th, which enacts, that after such issue tried for the defendant, or nonsuit of the plaintiff, the defendant shall recover treble damages and costs; yet that obviously can have no reference to proceedings at the suit of the crown.

Dundas, contra.—The plea is good. The effect of the stat. 23 Hen. 8, c. 5, as connected with and explained by the 3 & 4 Edw. 6, c. 8, is, that the crown and the subject are placed in all respects, in reference to the commission of sewers, on the same footing. The 11th section of the former statute was framed with reference to all the subject matters contained in the preceding clauses, and its words—"any action of trespass or other suit"—are very general. An information of intrusion is a civil suit: *Savile*, 48; *Attorney-General v. Allgood* (a); *Attorney-General v. Donaldson* (b). In the last case, the statute of Anne, allowing double pleading, was held not to apply, because all its provisions have reference to suits between subject and subject. But the crown may be *plaintiff* in an action. This clause was introduced for the protection of the commissioners in all cases where they act in the exercise of their public duty. At common law, the crown might put a defendant in an information of intrusion on shewing his title specially:

(a) *Parker*, 10.

(b) 7 M. & W. 422.

Com. Dig., Prerogative, (D.) 74, *Attorney-General v. Hudson* (a): but the object of this statute was to relieve the commissioners from doing so. There would be vast inconvenience in being obliged to set out all their proceedings at length. Again, the crown is bound by an act of Parliament, although not named in it, where it is made for the advancement of religion, the maintenance of learning, or otherwise for the public good: *Willion v. Barkley* (b); *The Case of Ecclesiastical Persons* (c). This is a statute very much for the public good, having been made to protect the commissioners, discharging a public and highly beneficial duty, from vexatious suits. No doubt the crown cannot be nonsuited; but the Court may exercise its judgment distributively on the 11th and 12th sections, and apply them to the crown where they can do so.

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Secondly, this rate was lawfully levied. It cannot be said, since the decision in *Netherton v. Ward*, that the statutes of sewers do not extend to the property of the crown. [On this point he referred also to the statutes 23 Hen. 8, c. 5, s. 8, and 13 Eliz. c. 9, s. 1; *Whitley v. Fawcett* (d); *Holford v. Copeland* (e); 1 Nolan, P. L. 192, note; *Soady v. Wilson* (f); *Rex v. Matthew* (g).] The case of *Winter v. Miles* has been referred to as shewing that Kensington Palace retains all the privileges of a royal palace: but that was with reference to the case of process at common law. In *Rex v. Stobbs* (h), however, it was held that process out of the Palace Court was executable within the palace of Westminster, under the charter of Charles II. constituting that Court, and giving it jurisdiction within the palace. The Statute of Sewers has the same operation, and so far limits the common-law prerogative of the crown.

(a) 2 Dy. 238 b.

(b) Plowd. 236.

(c) 5 Rep. 14 b.

(d) Styles, 12.

(e) 3 Bos. & P. 133.

(f) 3 Ad. & E. 248.

(g) Cald. 1.

(h) 3 T. R. 735.

Exch. of Pleas, Jenkins's Century, 112, case 18; Dugdale on the Statute of Sewers, 307 (a).
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The *Attorney-General*, in reply.—The proceeding by information of intrusion combines the incidents of an indictment for an improper entry on the lands of the crown, and also of an action for damages. But assuming it to be only an action of trespass by the crown, yet the 11th and 12th sections of the statute, being read together, shew clearly that the legislature had not the crown in view at all. The argument from the supposed difficulty of pleading the facts specially tends to the same inference. But why, if the fact be so, may not the defendants plead that the locus in quo was in the occupation of a gardener or other inferior person, absque hoc that it was in the occupation of the crown.

As to the other point, the case is altogether different from that of *Netherton v. Ward*. There the property taken was not public property, and the plaintiff was admitted by the case to be an occupier: but the crown is not an occupier within the statute. There is no fund out of which such a charge as this can come, for the expenses of the royal palace are provided for by votes of Parliament, and are charges on the Consolidated Fund. *Rex v. Stobbs* does not apply, because there the prerogative was expressly limited by the charter.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—There was a case of *The Attorney-General v. Donaldson and Others*, which was argued before this Court during the last term. It was an information against the defendant for intrusion into a certain message or

(a) In his "History of Embanking," 1662.

dwelling-house in the parish of St. Margaret, being parcel of the royal palace of Kensington, long before then and at that time in the occupation of our Lady the Queen, and for committing certain trespasses therein. The defendants pleaded that the several trespasses in the information mentioned were committed by them under the authority and in pursuance of a commission of sewers, at the time when &c., being in full force, for tax assessed by the said commissioners according to the tenor and effect of the several statutes of sewers; and to this plea there was a general demurrer. On the argument of this demurrer, two points were made. First, that a royal palace, being the residence of the sovereign, was not within the authority of the commissioners of sewers. Secondly, that the general form of pleading given by the Statute of Sewers was not allowable on an information of intrusion at the suit of the crown. We are of opinion that the latter objection must prevail, and consequently it is unnecessary to determine whether the averments in this information are sufficient to shew that Kensington Palace was a royal residence at the time of the alleged intrusion, assuming that a distress for non-payment of a sewers' rate, which certainly may be levied on land in the occupation of the servants of the crown, by virtue of the 9th section of the 23 Hen. 8, c. 5, and the 3 & 4 Edw. 6, c. 8, cannot be levied, any more than the ordinary process of the law can be executed, within the precinct of a royal palace occupied as the residence of the sovereign, by reason of the respect due to the royal person. Upon this latter proposition we do not mean to intimate any doubt, although we are not satisfied that sufficient appears on the face of the record to give to Kensington Palace the privilege that belongs to a royal residence of the sovereign.

The question whether a defendant at the suit of the crown is entitled to the privilege of the general plea, depends on the construction of the 11th section of 25 Hen. 8, and the context of that act. It is a well-established rule, generally

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speaking, in the construction of acts of Parliament, that the king is not included unless there be words to that effect; for it is inferred *primâ facie* that the law made by the crown, with the assent of Lords and Commons, is made for subjects and not for the crown: *Willion v. Barkley*. Now, in this case the 11th section gives the privilege of a general plea in any action of trespass or other suit, and directs that the plaintiff may reply generally; and the 12th section gives treble damages and costs to the defendant, by reason of his wrongful vexation. The language of both these sections is pointed at actions between subjects merely, and not to suits in which the crown is concerned; and, generally speaking, the crown is not bound under the terms "party to the suit:" *Regina v. Tuchin (a)*. Nor do the terms "action or suit," where the privilege of double pleading is given by the statute 4 & 5 Anne, c. 16, s. 5, apply to informations of intrusion, as has been already decided by this Court in this very suit, on the authority of *The Attorney-General v. Allgood*; and we cannot find any thing in the rest of the act to control the ordinary meaning of these terms, and to raise an implication that the crown was meant to be affected in its proceedings. The probability is, that the legislature never contemplated a case of distress being necessary in respect of an assessment on crown lands. Our judgment on this demurrer must therefore be for the crown.

Judgment for the Crown.

On a subsequent day (June 11),

Dundas applied to the Court for leave to plead *de novo*, or to amend the plea.

ALDERSON, B.—When this case was argued, the Court

(a) 3 Ld. Raym. 1066.

entertained some doubt whether it sufficiently appeared on the face of the information that Kensington Palace was the residence of the sovereign: but we cannot allow an amendment of the plea, because in point of fact there can be no doubt that it is so. Her Majesty has a right to go and live there, and there is no one who could resist her demand to take up her abode in the palace.

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The other Barons concurring,

Motion refused.

WILLIAMS, Executor of WILLIAMS, v. GRIFFITH.

June 10.

IN this case the testator, H. R. Williams, an attorney, had brought an action against the defendant for his bill of costs, which was delivered by him pursuant to the statute, and referred to taxation by a judge's order. Pending the taxation, the action abated by his death. The plaintiff, as his executor, afterwards commenced this action against the defendant for the amount of the same bill. A rule had been obtained, calling upon the plaintiff to shew cause why the bill should not be referred to the Master for taxation, without giving the usual undertaking, and without prejudice to the defendant's defence to the action; against which

The Court has no power to refer to taxation an attorney's bill containing taxable items, in an action brought upon it by his executor.

R. V. Richards and *Welsby* now shewed cause.—This application cannot be supported. It is only where a bill must be delivered, that the Court has power to refer it to taxation; the two branches of the stat. 2 Geo. 2, c. 23, s. 23, being in this respect correlative. But the executor of an attorney need not deliver a bill, and he *cannot* deliver one signed by the attorney in conformity with the statute. It was indeed held in *Penson v. Johnson* (a), that

(a) 4 Taunt. 724.

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where the executor did deliver a bill, or where it had been delivered by the testator in his lifetime, it might be referred to taxation; but that case was not much considered, and was overruled, after time taken to consider, by *Patteson*, J., in *Doe d. Sabin v. Sabin* (a), which is expressly in point for the defendant. The rule was laid down by this Court in *Williams v. Griffith* (b), that in the case of an action brought by an attorney on a bill containing any taxable item, the Court, in the exercise of its jurisdiction over its own officer, will refer it to taxation; but there is nothing in that case to shew that the Court assumed any jurisdiction beyond that given by the statute.

Jervis, contra.—The decision in *Williams v. Griffith* goes to this extent, that in order to give the Court jurisdiction, after action brought, to refer the bill for taxation, it is sufficient that it is a bill containing some taxable item; and it is not necessary for that purpose that the party bringing the action should be an officer of the Court. The Court has cognizance of the cause, and will, in the exercise of its equitable jurisdiction, refer the subject-matter of it to be examined into by the only competent tribunal. The case of *Doe d. Sabin v. Sabin* does not apply, because there no action was brought, and the judgment of *Patteson*, J., proceeds mainly on that ground.

LORD ABINGER, C. B.—I think this rule must be discharged. We are called upon to carry the principle a step farther than it has hitherto gone, by subjecting a party who is not an attorney to the summary jurisdiction of the Court. It certainly would be much more convenient if the parties could agree to refer the bill to taxation, and I cannot suppose that the executor would have a better chance with a jury than with the Master. But, in order to enable us to make this rule absolute, two points should

(a) 8 Dowl. P. C. 468.

(b) 6 M. & W. 32.

concur; an action should be brought by an attorney for his bill, and the bill should contain taxable terms.

ALDERSON, B.—I am of the same opinion, To give the Court jurisdiction, two circumstances must concur; the action must be brought on an attorney's bill containing taxable items, and it must be the attorney who brings the action.

GURNEY, B., and ROLFE, B., concurred.

Rule discharged, with costs.

COOMBS, Administratrix, v. NOAD.

June 2.

DETINUE by the plaintiff, as administratrix of John Coombs, for certain goods and chattels, to wit, 1000 yards of broad cloth, and two pieces of other cloth, the property of the intestate.

Pleas, first, non detinet. Secondly, that the intestate delivered to the defendant the said goods and chattels in the declaration mentioned, to wit, the said cloths, to be by him, in the way of his trade, milled and prepared, for certain reward, and on the terms that the price and value of the work to be done by the defendant in milling and preparing the said cloths as aforesaid, should be paid upon the completion of the milling and preparing of the said cloths; and that the defendant should have a lien on the said cloths for the price and value aforesaid, and be entitled to detain the same as a security for the payment of such price and value to the defendant: that the defendant received the said cloths upon those terms, and milled and prepared them; and that the reasonable price and value of the said work therefore payable to the defendant,

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In an action of detinue for certain goods, to wit, 1000 yards of broad cloth and two pieces of other cloth, the defendant by his plea claimed a lien for fulling the cloths mentioned in the declaration; and it appeared at the trial that originally eight pieces of cloth had been delivered at the same time to the defendant to be fulled, and that six out of the eight pieces had afterwards been re-delivered:—*Held*, that the plea only extended to the two pieces actually detained, and that the

defendant could not under that plea set up a claim of lien for fulling more than two pieces, but should have asserted specifically his claim in respect of the eight.

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amounted to a large sum of money, to wit, the sum of £15, which money remaining due, the defendant detained, and still did detain, the said cloths as such lieu and security for its payment.

Replication, that after the milling and preparing the said cloths, the plaintiff tendered and offered to pay the defendant the sum of 10s., parcel of the said sum of £15, being the price and value of the work done by the defendant in milling and preparing the said cloths, which the defendant refused to accept; and, as to the residue of the said sum of £15, that the said sum of 10s. and no more was the reasonable price and value of the work in the plea mentioned, and the only sum due and owing to the defendant, in respect thereof, at the time of the detention.

Rejoinder, that the price and value of the milling and preparing the said cloths was a sum of money greater than the said sum of 10s., to wit, the sum of £15: without this, that the said sum of 10s. and no more was the price and value of the milling and preparing of the said cloths, in manner and form as the plaintiff alleged, whereupon issue was joined. There was also a plea of a general lien, which was traversed, and became immaterial.

At the trial before *Erskine, J.*, at the last assizes at Salisbury, it was proved that the intestate had originally delivered eight pieces of cloth at the same time to the defendant to be fulled, and that six out of them had been afterwards re-delivered. That the defendant then detained the remaining two pieces under a claim of lien for the amount due for fulling all the eight pieces, and that a sum had been tendered by the plaintiff, which only amounted to the price of fulling the two pieces. The defendant thereupon contended, that, as the contract was entire for fulling the eight pieces, he was justified in detaining the two for the whole sum; and that he had not waived that lien by giving up a portion of the goods. It was however urged on the part of the plaintiff, that the plea of lien

only extended to the goods actually detained, and the price of fulling them, and not to all the goods mentioned in the declaration. The learned Judge was of opinion that the plea extended to all the goods mentioned in the declaration, and thereupon directed the jury to find a verdict for the defendant on the second plea, reserving leave to the plaintiff to move to enter a verdict for her, should the Court be of opinion that the plea was thus limited, or that the defendant had no right of lien in respect of the price of fulling all the pieces.

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Erle having, in Easter Term, obtained a rule accordingly,

Barnstow shewed cause.—The defendant had a lien on the whole of the eight pieces, and the contract being entire, he was justified in detaining any part of the goods for the whole sum which became due to him under it; and he did not give up that right by re-delivering six of them: *Ford v. Baynton* (a). There *Thurnton, J.*, after having conferred with the other Judges of the Court of Queen's Bench, says, "We are of opinion that, as the two horses were brought at one and the same time, and therefore under one contract relating to both, the lien of the innkeeper upon both survives as to the remaining one. The innkeeper must therefore be paid the amount due for the keep of both horses." The case of *Blake v. Nicholson* (b) is very like the present. There it was holden that a printer employed to print certain numbers, but not all consecutive numbers, of an entire work, has a lien upon the copies not delivered for his general balance due for printing the whole of those numbers. As to the form of the plea, it is pleaded to a declaration on which the plaintiff might have recovered damages for the detention of the whole eight

(a) 1 Dowl. P. C. 357.

(b) 3 M. & Selw. 167.

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pieces: the plea confesses the whole declaration; the defendant has no means of ascertaining precisely in respect of what the plaintiff will complain, and therefore he pleads to the whole. Suppose the defendant, at some former period, had refused to deliver the whole of the eight pieces, and afterwards had given up six, he might be anxious to justify that detention, as he could not know whether the plaintiff would rely upon it or not. He therefore pleads in such a way as to meet any aspect that the case may assume.

Erle and *Bere*, in support of the rule, were stopped by the Court.

LORD ABINGER, C. B.—The plea does not apply to all the goods mentioned in the declaration, but only to *those detained* by the defendant. Now the defendant had before the action delivered up six out of the eight pieces, and the plaintiff complained therefore only of the detainer of the two. The plea therefore applies only to those two, and the amount due for them had been tendered; and the plaintiff therefore made out his issue. If the defendant intended to insist upon a lien for fulling other cloths, he should have mentioned them in his plea.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

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FOX v. FRITH and Others.

June 2.

ASSUMPSIT by the plaintiff as the payee, against the defendants as the makers, of a promissory note, dated the 17th of August, 1839, for £1385, payable on the 1st of August, 1841.

Pleas, first, that the defendants did not make the note: secondly, that before the making of the agreement thereafter mentioned, and of the said promissory note, the defendants and others were united in copartnership under the name of the West Mining Association; that on the 10th of July, 1839, a certain agreement in writing was made between the plaintiff and the defendants, whereby the plaintiff agreed to sell, and the defendants, as such directors, to purchase, 1000 shares of the stock of the Pennance Mills Mining Company for £1385, in part of such purchase, and also in consideration of the delivery to the plaintiff of 200 scrip or registered certificates of shares in the stock of the West Mining Association; that upon the making of the said agreement, and before the making of the promissory note, the defendants delivered to the plaintiff, and the plaintiff accepted, the 200 scrip certificates, and the plaintiff then became the proprietor thereof, and entitled to share in the dividends and profits of the said co-partnership; and that the defendants as such directors, and for and on behalf of the

By a deed dated 7th May, 1839, a company was formed called the West Mining Association, of which the defendants were directors. The plaintiff, by an agreement dated 10th July, 1839, agreed to sell to this company 1000 shares in the Pennance Mills Mining Company, to be paid for by the sum of £1385, and by the delivering to him of 200 scrip certificates of shares in the West Mining Association. The money was to be paid on the 1st of August, 1841. Immediately upon the execution of the agreement, 200 scrip certificates were obtained by the plaintiff's agent, and entered in the register book of the West Mining

Association in the plaintiff's name. The defendants afterwards gave the plaintiff the following promissory note, dated August 17, 1839: "We jointly promise to pay to J. F. (the plaintiff) £1385, on the 1st of August, 1841, for value received in Pennance shares pursuant to annexed contract." This note was signed by all the defendants in their individual names. The deed of settlement of the West Mining Company provided that holders of scrip certificates should not be considered as qualified proprietors; and that a certain proportion of the net profits of the year should be divided amongst the shareholders and scrip-certificate holders, in proportion to their several shares and interests. The plaintiff had not paid any instalments nor signed the deed of settlement, but continued to be the holder of the scrip certificates:—*Held*, in an action brought upon the note, that a plea that the defendants made the note as directors and on behalf of the mining co-partnership, and that the plaintiff was a partner with the defendants, was not supported by proof of the above facts.

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said co-partnership, made the promissory note to the plaintiff, for the purpose of securing payment of the sum of £1385; and that the plaintiff, before and at that time, was a partner with the defendants in the said co-partnership.

Replication, *de injuriâ*.

At the trial before *Erskine, J.*, at the last Spring Assizes for the county of Cornwall, the following facts were given in evidence. By a deed of settlement, dated the 7th of May, 1839, a company was formed called the "West Mining Association," and the defendants were appointed directors. By a clause in the deed, all bills and notes were to be drawn, indorsed, accepted, &c., by three directors. On the 10th of July, 1839, another company, called the "Pennance Mills Mining Company," was formed, of which all the shares were vested in the plaintiff. On the same day the plaintiff, by agreement, stipulated to sell 1000 of these shares to the West Mining Association, to be paid for partly by the sum of £1385, and partly by the delivery to the plaintiff of 200 scrip or registered certificates of shares in the West Mining Association, with the sum of £2 certified to be paid on each of such shares. The sum of £1385 was not to be paid until the 1st of August, 1841. Immediately upon the execution of the above agreement, 200 scrip certificates were obtained by the plaintiff's agent, and were entered in the register-book of the West Mining Association in the plaintiff's name. A promissory note was afterwards given by the defendants to the plaintiff, which was as follows:—

" £1385.

" London, August 17th, 1839.

" We jointly promise to pay to Joshua Fox the sum of £1385 on the 1st day of August, 1841, for value received in Pennance shares, pursuant to annexed contract."

(Signed by all the defendants, who were five of the directors of the Company, but not stating them to be such).

By the 25th clause of the deed of settlement it was provided, that those proprietors only should be considered as qualified proprietors, and entitled to vote, who should individually be proprietors of not fewer than twenty-five *registered* shares. The 26th provided that the holders of scrip certificates should not be considered as qualified proprietors, and entitled to vote at general meetings in respect thereof. The 86th clause provided that a certain proportion of the net profits of the year, or so much as the directors should determine, should be divided amongst the shareholders and scrip-certificate holders, in proportion to their several shares and interests accordingly. The plaintiff, it appeared, had not signed the deed of settlement, nor paid the instalments due on the shares. At the trial, a verdict was found for the plaintiff upon all the issues, leave being reserved to the defendants to move to enter a verdict on the second issue, if the Court should be of opinion that, under the circumstances above stated, the second plea was proved. —*Crowder* having, in Easter Term last, obtained a rule accordingly,

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Erle and *Butt* now shewed cause.—The plaintiff was not a partner in the West Mining Association at the time the agreement creating the debt was made, and therefore the promissory note was binding upon the defendants, and the plea was not supported. He could not become a partner until the transfer to him of the 200 shares, which took place subsequently to the making of the agreement. Besides, by the 26th clause of the deed of settlement it is expressly provided, that the holders of scrip certificates should not be considered as qualified proprietors; and the deed draws a marked distinction between shareholders and scrip-certificate holders. The scrip certificates were transferable to bearer; there was no knowing who were the holders of them. Secondly, this was a separate debt. The note not being signed by the defendants as directors,

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or stated it to be made by them on behalf of the company, the parties were bound individually, and the defendants have no right by parol to shew that it was connected with the partnership transaction: *Emly v. Lye* (a); *Siffkin v. Walker* (b); *Woodbridge v. Spooner* (c). The plea states that the defendants as directors made the note, but they did not do so. The distinction is, that where a partner draws on other partners by name, and they individually accept, he may recover against them, because by such an acceptance a separate right is acknowledged to exist; as was said by *Best, C. J.*, in *Neale v. Turton* (d), which is also shortly stated in *Collyer on Partnership*, 179. It makes no difference if it was in truth given on the partnership account, if it be given by the parties individually, and as a separate transaction. [They were then stopped by the Court.]

Crowder, Swann, and M. Smith, in support of the rule.—The defendants are entitled to have the verdict entered for them. Although the note does not express that it is given by the defendants as directors of the company, the plaintiff and the defendants were jointly interested in the fund out of which the £1385 was to be paid, the plaintiff having become so interested as soon as he received and accepted the scrip certificates. If a dissolution of the partnership were to take place, the plaintiff would be entitled to his share of the funds of the company. A court of equity is the proper place in which to sue the defendants, and the plaintiff has no right to sue the makers of the note in a court of law, for he is thereby suing himself. The plaintiff was still a scrip holder up to the commencement of the action, and therefore he had not parted with or forfeited his interest in the fund. The plea states that the defendants made the note as directors, and they did so in fact, and it makes no difference that they signed it in their own

(a) 15 East, 7.

(b) 2 Camp. 308.

(c) 3 B. & Ald. 233.

(d) 4 Bing. 151; 12 Moore, 365.

names. In *Teague v. Hubbard* (a), a member of the Cornish Tin Smelting Company was employed by the company as their agent to sell goods, receiving a commission for his trouble; having sold goods on account of the company, he drew on the purchaser a bill of exchange, payable to his the drawer's own order, and after it had been accepted he indorsed it to the actuary of the company, and the latter indorsed it to another member who was the managing director, and who purchased goods for the company: the company being then indebted to him in a larger amount than the sum mentioned in the bill. The acceptor having become insolvent before the bill became due, the drawer received from him 10s. in the pound upon the amount of the bill by way of composition: and it was held, that the indorsee, being a member of the company, could not sue the drawer on the bill, inasmuch as it was drawn by the latter on account of the company, and that he could not recover the sum received by the drawer on the bill, because that money must be taken to have been received by him in his character of a member of the company, and not on his own account. It is not stated in the report that the bill was drawn by procuration of or for the company. Lord *Tenterden*, C. J., there says—"If the plaintiff could recover on these bills, it would be a recovery by one joint contractor against another; and then the defendant would have a right to call upon the plaintiff for contribution. It is clear, therefore, that no action can be maintained upon the bills." [*Erle*.—It appears from the report of that case in 2 Man. & Ry. 369, that "in drawing the bills the defendant wrote his name 'Zach. Hubbard, for Cornish Tin Smelting Company;'" and there is the following note on that case in *Collyer on Partnership*, 758:—"The form of the drawer's signature seems not to have been noticed by the Court. Suppose the drawer had drawn and indorsed in his own name only, would the decision

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(a) 8 B. & C. 345.

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have been the same?"'] [*Rolfe*, B.—This Court decided the contrary in *Higgins v. Senior* (a).] In *Teague v. Hubbard*, the bill is made payable to the drawer's own order, which means his own personal order. If he was personally liable, why was not the action against him held maintainable? Here the note on the face of it was made with reference to the annexed agreement, and it is with reference to that the note is signed.—They also cited *Goddard v. Hodges* (b), and *Mainwaring v. Newman* (c).

LORD ABINGER, C. B.—This is a plain case. The distinction is between an actual partnership and an inchoate right of partnership. It is true that the plaintiff had a right to become a partner if he had chosen to pay up his instalments; but he did not determine to become a partner, and he did not pay up his instalments, or sign the deed. If then he did not become a partner, the plea is not proved, but the debt is proved. Even if the plaintiff had signed the deed, I should have had great doubts whether the defendants had not made themselves liable. It cannot be supposed that the plaintiff intended that the contract should be such a one as should force him to seek his remedy in equity. The defendants gave the plaintiff a promissory note, in which they do not describe themselves as directors; and we must presume, that in the event of the note not being paid by the partnership, they intended, as honest men, to make themselves personally liable. Clearly, the plaintiff, in taking this promissory note, had no intention of being driven to resort to a Court of Equity. The rule, therefore, must be discharged.

GURNEY, B., concurred.

BOLFE, B.—The defendants state in their plea, that they made the note as directors, and for and on behalf of the

(a) 8 M. & W. 834.

(b) 1 C. & M. 33.

(c) 2 Bos. & Pull. 120.

copartnership; but that was not supported by the evidence. In one sense, indeed, they may be said to have done so; as in the event of their paying it, they would have equitable rights as against the company. It certainly was not the intention of the plaintiff, that in the event of the bill being unpaid, he should be driven to resort to a Court of Equity.

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Rule discharged.

Sir JOHN MORRIS, Bart., v. VIVIAN and Another.

June 4.

THIS was an action for damage to a mine, by permitting the water to flow into it from an adjacent mine belonging to the defendants, and was tried at the last Glamorganshire Assizes by a special jury, when a verdict was found for the defendants. In Easter Term, *E. V. Williams* obtained a rule for a new trial, upon affidavits which stated, that the trial lasted two days, and that on the evening of the first day, when the Judge had not commenced summing up, two of the jurors went to the defendant's house, and dined and slept there. Affidavits were filed in answer, which stated, that the defendant resided near Swansea, and that it was customary in Glamorganshire, at the assizes, for gentlemen, coming from a distance to attend them, to be invited to the house of the neighbouring gentry; that there was but one inn, which afforded very indifferent accommodation, and that one of the two jurors, upon his arrival in the town, had met Sir John Morris, who expressed his regret that he was unable to entertain him, in consequence of the absence of Lady Morris; that Mr. Vivian was trustee of the mine, and had only a very slight interest in it, and that no allusion to the subject of the trial had been made

Where two of the jury, during the progress of a trial which lasted two days, dined and slept at the house of the defendant on the evening of the first day, and consequently before the summing up:—*Held*, that this did not avoid a verdict found for the defendant.

Held, also, that it was discretionary with the Court whether they would set aside the verdict and grant a new trial in such a case; and where the party making the application declared that he did not entertain any belief that the jurors, in giving their verdict, were influenced by

their visit, and there were no grounds for suspicion of unfairness, the Court refused to set aside the verdict.

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to or by either of the jurymen during their stay in the house. *E. V. Williams*, on moving for the rule, and also at the commencement of the argument, stated, that neither he nor his client entertained a belief that the two jurors had been influenced in the slightest degree by their visit to Mr. Vivian in giving their verdict, and that he was instructed expressly to disclaim any imputation of that kind.

Chilton, J. Evans, and Groves, shewed cause.—In Co. Litt. 227. b., it is laid down, that “if the jury, after their evidence given unto them at the bar, do at their own charges eat or drink, either before or after they be agreed on their verdict, it is finable, but it shall not avoid the verdict; but if, before they be agreed on their verdict, they eat or drink at the charge of the plaintiff, if the verdict be given for him, it shall avoid the verdict; but if it be given for the defendant, it shall not avoid it, et sic e converso.” The treating alluded to there is evidently such as the whole jury partake of, and that only after the summing up is over. The cases of *Trewennarde v. Skewys* (a), *Rex v. Burdett* (b), and *The Duke of Richmond v. Wise* (c), are confined to treating under circumstances of that kind. No distinction is made between the period at which eating or drinking is finable, and that at which it shall avoid the verdict. Then, under the circumstances of this case, the Court will not exercise their discretionary power of granting a new trial, the plaintiff having expressly admitted that he has not been prejudiced by what occurred.

E. V. Williams, in support of the rule.—Although all the cases upon treating to be found in the books are where the jury had retired, yet the ground assigned for the rule which avoids a verdict is, that it induces favour and affection: Vin. Abr. “Trial,” (G, g); Bro. Abr. tit. “Jurours;”

(a) Dyer, 55 b.

(b) 2 Salk. 645.

(c) 1 Vent. 124.

and that would be equally applicable to treating the jury at one time as another, either during the trial or after their being charged. In Buller's N. P., p. 308, it is said, "It is finable for the jury to eat at their own expense after they are departed from the bar; but it will not avoid the verdict, as it will if they eat at the charge of him for whom the verdict was given, before they are agreed on their verdict." So in the same book, page 326, it is said, "new trials are often granted for the misbehaviour of the jury, or if they cast lots for their verdict; so if they eat at his expense for whom they give the verdict." The law is so jealous upon this point, that the sheriff is not permitted to summon the jury, if he be in any way related to the parties, or interested in the cause. The policy of the law is to avoid the possibility of suspicion attaching to the jury; and the same suspicion of injustice will be created in the mind of the public, whether the treating occurs before or immediately after their retirement from the bar to consider their verdict. But it is said that the treating must extend to the whole jury. The same reason, however, which forbids the treating of all, extends to the treating of any of them; the number can make no difference. If the contrary were the rule, a party might, without risk, treat eleven out of the twelve with impunity. It is a fixed and settled principle of law, quite independent of the circumstances of any particular case, that, where there has been treating of the jury, the verdict is void, and the setting of it aside is not a matter for the discretion of the Court.

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LORD ABINGER, C. B.—It is our province to administer justice, and, in doing so, not to permit ourselves to be influenced by any apprehension of the opinion which the public may form. If the learned Judge who tried this cause had thought the verdict had been contrary to the weight of evidence,—a circumstance which would have induced us to look to some motive for it,—or if any

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corrupt motive could at once be seen, we might have been inclined to set it aside: but here it is alleged to be the concurrent opinion of all parties, that there was neither corruption nor favour. If the public are to form an opinion, let them understand that this was a case in which all imputation of influence and favour was entirely disclaimed. Now, what are the facts of it? There was but one inn, which afforded very insufficient accommodation, and in consequence, two of the jury, one of whom would have been invited to his own house by Sir John Morris, but for an accidental circumstance, found their way to Mr. Vivian's. He had no substantial interest in the suit, and the matter was never there discussed. Under these circumstances, unless there is some positive peremptory rule, which compels us to set aside this verdict, we ought not to do so. Then do the cases establish this? On the contrary, they only shew that, where all that remains for the jury is to deliberate upon and give their verdict, if they eat or drink at their own expense they may be fined, and if at the expense of the party for whom their verdict is given, it is void. Those cases seem to apply to the whole jury, and only to acts done by them after they are charged. It is quite clear that, in this case, they could not have been fined for eating or drinking at their own expense, and I do not see that they fall within the other branch of the rule. Then it is a case in which we are called upon to exercise our discretion; and I think we should not set aside this verdict, since by doing so we should be casting an unfounded imputation upon these gentlemen.

ALDERSON, B.—I am of the same opinion. I disclaim laying down a rule for any case where suspicion of unfairness or bias can possibly attach; but here the parties, counsel, and every one else, concur in repudiating the notion that they intend to make any charge of the sort. There is no imperative rule which compels us to set

aside such a verdict as this, and the granting of a new trial is a matter for our discretion. Under these circumstances, I think we ought not to interfere.

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GURNEY, B., and ROLFE, B., concurred.

Rule discharged.

YARDLEY v. ARNOLD.

June 7.

ASSUMPSIT against the defendant as executor de son tort of his father, John Arnold, deceased.

The defendant pleaded plene administravit, except as to 2*l.* 19*s.* 6*d.*, which he paid into Court. He also pleaded payment of £11 by the deceased.

The plaintiff took issue on the above pleas.

At the trial before *Parke*, B., at the Middlesex sittings in this term, it appeared that the defendant relied on a bill of sale of the father's stock in trade and other effects, made by him to the defendant shortly before his decease, and under which the defendant had taken and retained possession of the effects. This bill of sale was impeached by the plaintiff as having been executed without consideration, in fraud of the other creditors. The defendant, in order to prove the execution of it, called his mother as a witness, who, upon being examined on the voir dire, proved that she was the widow of John Arnold, and that her husband left no will. No objection was then made to her competency, and she was sworn in chief; but before any question was put to her on oath, it was objected by the plaintiff's counsel, that being the widow of the intestate, she was entitled to a distributive share of the assets after the payment of the debts of the deceased, and consequently had a direct interest in the event of the suit; and the learned Judge being of that opinion, rejected the witness as incompetent. It was then proposed to indorse her name on the record under 3 & 4

The widow of a person who has died intestate is not a competent witness, in an action brought against a person (who has got possession of the intestate's goods) as executor de son tort, for a debt due from the estate, to prove the due execution of a bill of sale of his goods by the intestate to the defendant.

It is not too late to object to the competency of a witness after he has been sworn in chief, but before he has been asked any question on oath.

Exch. of Pleas, Will. 4, c. 42, ss. 26 & 27, but the learned Judge was of opinion that this was not a case to which the provisions of that statute were applicable, and that doing so would not render her competent. The plaintiff having recovered a verdict,

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R. V. Richards now moved for a new trial.—First, the objection to the competency of the witness was made too late; it ought to have been made upon her examination on the voir dire, and before she was sworn in chief. There was no excuse for not making the objection at the time when the witness was examined on the voir dire, as the objection, if any, appeared upon that examination. Secondly, the witness was competent. She was called, not to increase the assets, but to shew that there were none: that is, by proving the validity of a conveyance of all the property her husband had, which would effectually bar her or any other person entitled to a distributive share of his estate. [Lord *Abinger*, C. B.—If there were no assets now, but assets were afterwards to fall in, they would constitute a subject to which the verdict and judgment would be applicable if the plaintiff recovered. *Parke*, B.—The verdict would not affect the witness one way or other; but the result of it, if for the plaintiff, would be a charge on the assets. Lord *Abinger*, C. B.—The witness is interested to prevent this verdict becoming a charge on the assets.] There was no plea disputing the debt, and the witness's interest, therefore, was against the defendant. Objections of this nature all depend upon the effect which the testimony the witness is called upon to give may reasonably be presumed to exercise over the mind. The evidence this witness was called upon to give she must know would tend to prejudice herself. The question was not whether the assets were to be affected, but whether the defendant was liable as executor de son tort. In *Nowell v. Davies* (a),

(a) 5 B. & Ad. 368; 2 Nev. & Man. 745.

which was an action against executors for a debt of the testator, it was held that a person entitled to an annuity under the will was not disqualified by interest from giving evidence for the defendants. An annuitant is in the same situation, as respects interest, as a person entitled to distribution. The case of *Nowell v. Davies* has never been overruled, though it was sought to be impeached in the case of *Bloor v. Davies* (a); but the Court distinguished it from the latter case, on the ground that there the real estate, on which the witness's annuity was charged, would necessarily be affected, as the action was against the devisee of the estate on which it was charged.

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LORD ABINGER, C. B.—I am of opinion that there ought to be no rule. It appears to me that the witness was incompetent, as having an interest in the result of the suit; for the effect of a verdict against the defendant would be to take away so much of the assets as would be required to satisfy the debt. And as to the objection that she was called to support the validity of a deed which would bar her claim to a distributive share of the intestate's goods, any testimony she might give would not preclude her from filing a bill against the defendant. She could still question its validity, and therefore she has an interest to retain the assets in his hands. *Nowell v. Davies* can only be supported on the ground that the estate of the testator must be presumed to be solvent till the contrary is shewn; but that case has always been distinguished from the case of a residuary legatee, for the interest of a residuary legatee *must* be reduced by any claim which it is the object of the action to enforce. The case of *Bloor v. Davies* was decided upon a similar ground. We had occasion to consider the subject of the competency of a legatee in the case of *Burghart v. Hall* (b). I endeavoured to support the case of *Nowell v.*

(a) 7 M. & W. 235.

(b) 4 M. & W. 727.

Exch. of Pleas, Davies against the opinion of the rest of the Court, on the
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PARKE, B.—With respect to the principal question in this case, I entertain the same opinion now as I did at the trial. The point turns on the facts stated by the witness when examined on the voir dire; namely, that she was the widow of the deceased, and that he died without having made a will. The question is, whether on that statement she is an incompetent witness or not? I think she is. The argument of the defendant's counsel is founded on the old fallacy of mixing up an interest in the question litigated in the cause, with an interest in the event of the suit. There are but two objections which can legally be made to the competency of a witness on the ground of interest; namely, either that the verdict in the cause might be made use of as evidence by or against him on some future occasion, or that he has an interest in the event of the suit. The first of these is certainly not applicable here, for it is clear that this witness could not make the verdict evidence in her favour; and even if she could, the difficulty might be removed by indorsing her name on the record under 3 & 4 Will. 4, c. 42, ss. 26 & 27. But, secondly, has she an interest in the event of the suit? This expression I understand to mean, that some direct, immediate, and necessary consequence prejudicial to her interest would flow from a verdict for the plaintiff, while from a verdict the other way a corresponding benefit would result to her. Then is not that the case here? Would not the direct, necessary, and immediate consequence of a verdict for the plaintiff be, to fix a charge on the assets of the intestate to the amount of that verdict? And as she is entitled to the residue, or at least a part of the residue, of the assets, after every charge upon them has been paid off,

she has a most direct interest in preventing any such verdict. Then, however, it is said that the object in calling her was not to increase that fund, but to shew there was none; to which the answer is, that we do not know what is passing in the mind of the witness previous to her examination, or what evidence she is coming to give. The judge at *Nisi Prius* is to determine the competency, not to speculate on the credit, of the witness; and that competency depends on the state of facts disclosed on the voir dire, according as it shews whether the witness has or has not an interest in the event of the suit. The case of *Nowell v. Davies* is no authority to shew that the witness had no interest. That case was much considered in the subsequent one of *Burghart v. Hall*, in which there was a difference of opinion among the judges, a majority of the Court being disposed to think that the decision in *Nowell v. Davies* was not good law; but my Lord Chief Baron inclined to a contrary opinion, and considered that an ordinary legatee was a competent witness, on the ground that insolvency in the estate of a party deceased is not to be presumed. Still that has nothing to do with the case of a person entitled to a distributive share of an intestate's estate, who stands in the situation of a residuary legatee. The case of *Burghart v. Hall* was afterwards decided on another point. As to the period of the trial at which this objection was taken, I cannot help wishing very much that it were established as the regular practice, that, when once a witness is sworn, no question should be put to him in order to raise objections to his competency; I think all such should be put to him on the voir dire; and that, when once sworn in chief, his competency should be taken for granted; but certainly the practice has been different hitherto. In the case before us, the objection was made before any question was actually put to the witness on oath (a).

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(a) See *Dewdney v. Palmer*, 4 M. & W. 664.

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ROLFE, B.—I am of the same opinion. According to Mr. *Richards's* argument, this witness is to be deemed competent, because the object in calling her was not to increase the fund, but to shew that there was an instrument in existence which extinguished it; but the answer to that is, that you cannot tell from the examination of a witness on the voir dire what he will prove; if he appears incompetent from what transpires, you cannot remove the difficulty by saying that the witness shall not be asked any question which shall affect his interest and render him incompetent. But even supposing that that might be done, it would not alter this case, or have the effect Mr. *Richards* contends for, of removing the incompetency of this witness; for what, after all, does proof of the existence of this deed amount to? Nothing more than to shew something in the nature of an estoppel on this witness, whereby she would be precluded from saying that the chattels referred to in this deed formed part of the assets of the intestate. The question is, had she an interest to increase those assets? I think it is clear she had, and that this rule, therefore, ought not to be granted.

Rule refused.

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CASE. The first count of the declaration stated, that the plaintiffs, at the request of the defendants, bargained with them for the purchase by the plaintiffs of a cargo of coffee at a certain price, and upon certain terms (stating them); and that the defendants, by falsely and fraudulently warranting the said coffee to be *of the first shipping quality*, sold the said coffee to the plaintiffs at the price and upon the terms aforesaid, &c. &c. The second count alleged that the defendants were the consignees of the cargo of coffee, and that they, as a means to induce the plaintiffs to buy the said coffee, falsely, fraudulently, and deceitfully pretended, represented, and asserted to the plaintiffs, and by such fraud and false representation, induced the said plaintiffs to believe and suppose, that the said last-mentioned coffee was of first shipping quality; and that the plaintiffs, confiding in the said representation and assertion of the defendants, then bought of them the said coffee, as coffee of the first shipping quality, at a certain price and upon certain terms (as in the first count). The third count stated, that the defendants, at the time of the committing of the grievance by them as thereafter mentioned, exercised and carried on the trade and business of merchants at Liverpool, under the firm of Heyworth, Phipps, & Co., and also at Rio de Janeiro, in partnership together and with Benjamin Butterworth and John Carlisle, under the firm and description of Heyworth, Brothers, & Co.; and so carrying on such trade and busi-

A collateral statement, made at the time of entering into a contract, but not embodied in it, must, in order to invalidate the contract on the ground of its being a fraudulent statement, be shewn not only to have been false, but to have been known to be so by the party making it, and that the other party was thereby induced to enter into the contract. (Per *Parke, B.*, and *Alderson, B.*; Lord *Abinger, C. B.*, dissentiente).

A cargo of coffee was sold by a broker, for H., P., & Co. of Liverpool; and the words "invoiced to the sellers as of first shipping quality," were introduced into the bought and sold notes. At the same time the invoice was shewn to the

buyers, which stated the cargo to be shipped by H., Brothers, & Co., consigned to H., P., & Co., for sale on account and risk of whom it may concern—3150 bags "first shipping quality." H., Brothers, & Co. were a branch house at Rio de Janeiro, composed of the same partners as the firm of H., P., & Co.:—*Held*, in an action on the case against H., P., & Co. for deceit, that it was a proper question for the jury, whether the invoice imported that the coffee was invoiced to the defendants by distinct parties as the sellers thereof.

Quære, whether the action ought not to have been brought upon the contract, instead of in tort.

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ness in such co-partnership, had purchased, together with the said Benjamin Butterworth and John Carlisle, a quantity of coffee, on the joint account and at the joint risk of the said firms, which coffee was shipped at Rio de Janeiro and sent to England, invoiced to the defendants, by the style and description of Heyworth, Phipps, & Co.: that, after the arrival of the coffee in England, the defendants, in order to induce the plaintiffs to purchase the same, wrongfully and injuriously contriving and intending to deceive, defraud, and injure the plaintiffs, and to lead them to believe that the said coffee was in good faith invoiced by distinct parties to the defendants, as the purchasers or agents for the sale of the said coffee, the plaintiffs being wholly ignorant, and the defendants well knowing the plaintiffs to be wholly ignorant, of the premises above mentioned, fraudulently and deceitfully represented and asserted that the said coffee was invoiced to the sellers thereof as of the first shipping quality, thereby causing and intending to cause the plaintiffs to believe that the said coffee was so invoiced by some distinct parties to the defendants, as the purchasers or agents for the sale of the said coffee; and the defendants then exhibited a certain invoice, purporting to be made out by the said firm of Heyworth, Brothers, & Co. to the said firm of Heyworth, Phipps, & Co., in proof of the said last-mentioned representation and assertion; whereupon the plaintiffs, confiding in such representation, and believing that the said coffee was really and in good faith so invoiced by distinct parties to the defendants, as the purchasers or agents for the sale thereof, bargained with them for the purchase thereof on certain terms (stating them); and that the defendants, by means of such false representation and assertion, sold the said coffee to the plaintiffs, who paid for the same.

The defendants pleaded not guilty to the whole declaration, and nine other special pleas, traversing the material

allegations in each count, upon all which issues were joined.

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At the trial before Lord *Abinger*, C. B., at the London Sittings after Trinity Term, 1840, the following facts appeared:—The defendants were merchants carrying on business at Liverpool, under the firm of Ormerod Heyworth, Phipps, & Co., and at Rio de Janeiro in America (where they had a branch establishment), under the firm of Heyworth, Brothers, & Co. In the month of June, 1835, the Liverpool house sent an order to the house at Rio for a cargo of about 4000 bags of coffee, of the first shipping quality. In execution of this order, the Rio house purchased, in December, 1835, that quantity of coffee, by sample, from respectable coffee dealers, on the joint account and risk of themselves and the Liverpool house, the price and duty being paid by the house at Rio as on coffee of the first shipping quality. The coffee was shipped on board the ship *Asia* for England, and a shipping invoice in the following form (which was proved to be that invariably adopted by merchants abroad shipping goods to Europe), was transmitted to the firm at Liverpool by the Rio house:

“ Invoice of three thousand one hundred and fifty bags coffee, shipped by Heyworth, Brothers, & Co., of Rio de Janeiro, on board the British brig *Asia*, W. M. Bloomfield, master, for Cowes, and a market consigned to Messrs. Ormerod Heyworth, Phipps, & Co. of Liverpool, for sale on account and risk of whom it may concern—3150 first shipping quality coffee.”

In the spring of the year 1836, the defendants, in expectation of the arrival of the *Asia*, gave instructions to Messrs. Corrie & Co., their brokers in London, for the sale of the coffee on board of her. Corrie & Co. acting as brokers both for the buyers and sellers, entered into a negotiation for the sale of the coffee to the plaintiffs. The plaintiffs wished to have a warranty that it was of first shipping quality, but this Corrie & Co. declined, on the

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ground that it was unusual to warrant a cargo which was afloat, but they shewed the invoice to the plaintiffs, and consented to insert in the bought and sold notes the words "invoiced to sellers as first shipping quality." The contract was completed accordingly, and the plaintiffs paid for the coffee in cash, according to the terms of the contract, and on its arrival forwarded it to Amsterdam for sale. It was there discovered to be of an inferior quality, and the present action was brought to recover from the firm at Liverpool the amount of the loss sustained by the plaintiffs, by the consequent deficiency in the price obtained for it. The Lord Chief Baron was of opinion that there was no case to go to the jury on the first and second counts; and with respect to the third, he left it to the jury to say whether the plaintiffs were induced to accept the contract by any representation from the defendants that the coffee was invoiced to them by distinct parties. The jury found in the affirmative, and the verdict was thereupon entered for the defendants on the first and second counts, and for the plaintiffs on the third, leave being reserved to the defendants to move to enter a nonsuit.

In the following Michaelmas Term, the *Attorney-General* (Sir *John Campbell*) obtained a rule accordingly, or for a new trial, citing *Haycraft v. Creasy* (a), and *Early v. Garrett* (b).—In Hilary Term, 1841 (Jan. 19),

Sir *W. W. Follett*, *Kelly*, and *Deedes* shewed cause.—The third count of the declaration was proved by the evidence given on the part of the plaintiffs. It is clear that they purchased the coffee on the assumption induced by the terms of the contract, as agreed to by the brokers on behalf of the defendants, that it was invoiced to the defendants by distinct parties as consignors; whereas in truth the houses at Rio and Liverpool were the same, and the coffee was purchased and shipped for England, and the in-

(a) 2 East, 92.

(b) 9 B. & Cr. 928; 4 Man. & R. 687.

voice made out, by the defendants themselves to themselves. If it be said that the third count does not disclose any cause of action, that would have been ground for a motion to arrest the judgment, not for a nonsuit. The only question now is, whether there was any evidence to go to the jury in support of the count. The complaint is not that the defendants specifically represented that the coffee was consigned to them by distinct parties; the alleged misrepresentation is that which appears on the face of the contract, that it was "invoiced to sellers as of first shipping quality." The words "invoiced to sellers" would necessarily induce a belief that the two houses were distinct. [*Parke, B.*—The question is, whether the words introduced into the contract import such a representation as is charged in the declaration.] This was a mercantile instrument, and the interpretation of it was peculiarly a question for the jury. It was for them to say, upon the terms of the contract itself, and upon the whole transaction between the parties, whether the statement made in the contract was intended to imply that the coffee was invoiced to the defendants, the sellers, by distinct parties, as of first shipping quality. If the parties were different, then there would be a *warranty* from the house at Rio to the defendants, of which the plaintiffs would have had the benefit. Whether the purchase was made on the faith of such a representation, was clearly a question for the jury; and it is submitted that it was equally a question for them, whether the contract did or did not imply that that was a representation made by third parties. But if it be for the Court to decide on the construction of the contract, and if the invoice could not import such a representation as is stated in the count, that is a defect in the statement itself, and ought to have been made the ground of a motion to arrest the judgment.

But there was also evidence to sustain the other counts of the declaration. The invoice not being in fact that of a

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third party, but of the defendants themselves, when it was handed over to the plaintiffs, it became a representation *by the defendants* to the plaintiffs, that the coffee was of first shipping quality; which representation being false in fact, the allegations in the *second* count were thus proved. [*Alderson, B.*—Suppose Corrie had told the plaintiffs that the houses were identical; would it be a representation by the defendants to the plaintiffs, that the coffee was of first shipping quality? It is merely a representation that it was invoiced *by that invoice*: what the invoice imports is another question.] The defendants allege that they did not represent the coffee as being invoiced to them by third parties; if that be so, then they handed over the invoice as their own, and by doing so, they in effect represented the coffee to be of the first shipping quality, and the case becomes the same as if the coffee had been bought by the plaintiffs under that invoice. It is, in effect, purchased from the defendants under a written statement *by them*, which is *false in fact*, that it was of first shipping quality: and although they might have no knowledge of the inferiority of the coffee, yet, being interested parties, they are responsible for their untrue representation, which amounts to a fraud in law: *Hern v. Nicholls (a)*, *Schneider v. Heath (b)*, *Pawson v. Watson (c)*, *Cornfoot v. Fowke (d)*, *Humphreys v. Pratt (e)*. It is not necessary they should know the representation to be false; it is sufficient that they did not know it to be true.

Then as to the first count: as the representation in the invoice, which is imported into the contract, was made by the defendants themselves, it amounted to a warranty, for which the defendants are liable.—On this point they referred to *Shepherd v. Kain (f)*, *Yates v. Pym (g)*, and *Bridge v. Wain (h)*.

(a) 1 Salk. 289.

(b) 3 Campb. 506.

(c) Cowp. 785.

(d) 6 M. & W. 358.

(e) 5 Bligh, N. S. 154.

(f) 5 B. & Ald. 240.

(g) 6 Taunt. 446.

(h) 1 Stark. N. P. C. 504.

The *Attorney-General*, *Cresswell*, and *Cowling*, in support of the rule.—It is not disputed that a representation which is false in fact, although not proceeding from any immoral motive, amounts to a fraud in law, and is the subject of an action for deceit: *Polhill v. Walter* (a), *Foster v. Charles* (b): but it is a wholly different question how far it affects a party in relation to a *contract*. Whether a particular statement *in a contract* be or be not false within the knowledge of the party making it, is quite immaterial, for in any case he is bound to perform it. On the other hand, it is equally clear, that a representation in a matter extraneous from and *collateral* to the contract cannot affect him, even though it turn out to be untrue, unless it were made *fraudulently*. Here it is not pretended that the whole transaction was not carried on with perfect good faith. But where is the falsehood in this case? The coffee *was* invoiced to the sellers, i. e. to Ormerod Heyworth, Phipps, & Co., by the invoice which was produced, as of first shipping quality. The invoice was in terms precisely such as it was represented in the contract. The word “sellers” merely means the firm of Ormerod Heyworth, Phipps, & Co. Suppose the coffee had been bought for them by their *agents*, and consigned and so invoiced to them, could it have been said that this action was maintainable? What difference, then, does it make, that it was bought by a house abroad, of which the defendants, with two other persons, are members?

The first count clearly was not proved. There is no warranty whatever that the coffee *was* in fact of first shipping quality, but merely a statement that it was *invoiced* as such. It is said that the invoice was handed over to the plaintiffs: but quo animo? Certainly not, according to the evidence, as a *warranty*, and it cannot amount to more than a collateral representation, for which, in the absence of fraud, the defendants are not liable. [*Alder-*

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(a) 3 B. & Adol. 114.

(b) 6 Bing. 396; 7 Bing. 105; 4 M. & P. 61, 741.

Exch. of Pleas, son, B.—It cannot be carried beyond this; that, in some proceeding to which the defendants and others were parties, it was represented as being coffee of first shipping quality: that is a very different thing from an absolute warranty. *Parke, B.*—That part of the case is quite clear.] The same answer applies with regard to the second count.

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Then with respect to the third count. It is not contended that that count is bad in law; if there had been evidence of fraud, it might have been supported. Thus, if it had been proved that the Rio house had bought inferior coffee, and invoiced it to the defendants as of first shipping quality, and that the defendants, knowing this, had instructed their brokers to hand over the invoice, the plaintiffs might have been entitled to recover. Or if the plaintiffs had said to the broker, "Are these distinct houses?" and the latter had replied that they were, there would then have been a *suggestio falsi*, which might have rendered the defendants liable. But here, neither in writing nor by parol is there any representation that the two houses were distinct. It is therefore not material what inference the purchaser might draw from the invoice, unless the sellers meant him to draw it. Now the question left to the jury was, what was the inference the plaintiffs drew from the terms "invoiced to sellers as of first shipping quality?" There is nothing, therefore, found by the jury to support any of the allegations in the count,—no finding either of moral fraud or even of untrue statement. [*Parke, B.*—I do not see how this action can be supported without proving moral fraud; that is, that the defendants falsely asserted that they were two distinct houses, when there was in fact but one, and did so with a view of inducing the plaintiffs to enter into the contract. It seems to me to be essential to support the action, not merely that the plaintiffs surmised so and so, but that the defendants exhibited the invoice, meaning that there was in fact only one house, with the intention of inducing the plaintiffs to make the surmise that there were two dis-

tinct houses, by one of which the coffee was invoiced to the other as of a certain quality.] It is said that this is a mercantile instrument, of the interpretation of which the jury are the judges: but that is not so; the construction of a written instrument is in all cases for the Court, although the meaning of particular mercantile terms may be a question for the jury. The jury cannot alter the plain meaning of a written contract. Neither was this a representation calculated to impose upon a purchaser; it is merely collateral, and the plaintiffs might have inquired into the fact, had they desired the information. And further, there is nothing to shew that the purchase was in fact induced by the representation, or that it would not have been made, if the plaintiffs had possessed full knowledge that the houses at Rio and at Liverpool were not distinct establishments.

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Lord ABINGER, C. B.—As this case has been so fully argued, I think it right to make some remarks upon the arguments used by counsel. There has been a misunderstanding in this case in regard to the meaning of the word “fraud.” The fraud which vitiates a contract, and gives the party a right to recover, does not in all cases necessarily imply moral turpitude. There may be a misrepresentation as to the facts stated in the contract, all the circumstances in which the party may believe to be true. In policies of insurance, for instance, if an insurer makes a misrepresentation, it vitiates the contract: such contracts are, it is true, of a peculiar nature, and have relation as well to the rights of the parties as the event. In the case of a contract for the sale of a public-house, if the seller represent by mistake that the house realised more than in fact it did, he would be defrauding the purchaser, and deceiving him; but that might arise from his not having kept proper books, or from non-attention to his affairs; yet as soon as the other party dis-

Esch. of Pleas, covers it, an action may be maintained for the loss consequent upon such misrepresentation, inasmuch as he was thereby induced to give more than the house was worth.

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That action might be sustained upon an allegation that the representation was false, although the party making it did not know at the time he made it that it was so. It is not, however, necessary to go that length in this case. [His Lordship then stated the facts of the case, and continued.] It is plain, therefore, that the question is, whether the defendants have committed that species of fraud which renders them liable to an action. That depends upon the correct interpretation of the invoice as a mercantile instrument, and upon that only. Now, it is for mercantile men, who are in the habit of seeing such documents frequently, to say whether or not the form of the invoice in this case is that generally adopted where the goods are to be shipped and sold on a joint account, or whether it imports a shipment of goods consigned by a distinct class of persons. Could any Judge, looking at this invoice, say that it means no such thing, or that the goods might not have been shipped by distinct parties to the house at Liverpool? I should think not; and if so, then it is for the jury to determine whether it imports, among mercantile men, a shipment by and to distinct parties. The defendants must be taken to know its import; and if it does import that which is untrue, viz. that the goods were invoiced by distinct parties to them, whereas the invoice was made by themselves to themselves, then, if they meant thereby to facilitate the sale, it is what may be termed a legal though not a moral fraud. It appeared to me, and I still think, that those facts ought to be decided by the jury. Whether the jury have drawn a right conclusion it is not for me to say. The Court are disposed to think that another jury might come to a different conclusion, and as the sum is large, I concur with the rest of the Court that there should be a new trial, on the single point as to the representation to

the plaintiffs that the goods were invoiced by distinct parties. That must be on payment of costs.

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PARKE, B.—With respect to the first and second counts, it is clear that no warranty was meant to be given, and equally clear that the coffee was not represented by the defendants to the plaintiffs as being of first shipping quality; on these counts, therefore, the defendants are entitled to the verdict upon the plea of not guilty. It is on the third count that the only question arises. To support that count, it was essential to prove that the defendants *knowingly*, by words or acts, made such a representation as is stated in the third count, relative to the invoice of these goods, as they knew to be untrue, and that the plaintiffs were thereby induced to purchase them, which they otherwise would not have done. That question arises on the peculiar allegations set forth in that count. [His Lordship read the statement of the representation in the third count.] To give a right of action for that representation, it was, I think, essential to prove that, by words or acts of the defendants or their agents, it was made *falsely*, and for the improper purpose of inducing the plaintiffs to purchase the goods. I agree with the rest of the Court, that there was some evidence to support that count; and therefore it seems to me that the defendants were not in a condition to ask his Lordship to nonsuit the plaintiffs, nor to enter the verdict for them. I think it essential that there should be moral fraud, and indeed all the cases shew that it is, though the word *legal* fraud is used. That is a description of fraud not of so grave and serious a character, that is to say, a representation made without any private view of benefit to the party making it. The case of a policy of insurance does not appear to me to be analogous to the present; those instruments are made upon an implied contract between the parties, that everything material known to the assured should be disclosed by them.

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That is the basis on which the contract proceeds; and it is material to see that it is not obtained by means of untrue representation or concealment in any respect. In this case the plaintiffs must prove a representation, by words or acts, of that as being true which was known to the defendants to be untrue; as in the case of *Polhill v. Walter*, in which a party had falsely represented that he was authorized to accept a bill by procuration; so also in *Foster v. Charles*, where the allegation of the party was by a false representation of character. In both these cases, there was not any deliberate intention to deceive, yet it was called a fraud, though it was not of so grave a character. Now the only inference of fraud in the present case arises from the peculiar form of the instrument; that is a part of the case which seems fit for a jury, the question being, whether the invoice would necessarily be understood by mercantile men as an invoice usually passing from one house to another. I think my Lord could not have withdrawn that evidence from the jury; but if I were to give an opinion on the form of this invoice, I should say that the mere similarity in the names would favour the idea that it was a joint speculation, at all events sufficiently to excite inquiry, if the plaintiffs meant to buy on the basis of this being a representation that the goods were conveyed by a distinct house. I think, therefore, that there should be a new trial on payment of costs.

ALDERSON, B.—I entirely concur in the propriety of a new trial. [His Lordship then reviewed the evidence, and continued.] It has been urged by counsel, that the representation was in terms true. I do not agree to that, because I consider that if a person makes a representation, or takes an oath, of that which is true, if he intend that the party to whom the representation is made should not believe it to be true, that is a false representation; and so he who takes an oath in one sense, knowing it to be administered to him

in another, takes it falsely. This may be illustrated by an anecdote of a very eminent ambassador, Sir Henry Wotton who, when he was asked what advice he would give to a young diplomatist going to a foreign court, said—"I have found it best always to tell the truth, as they will never believe any thing an ambassador says, so you are sure to take them in." Now Sir Henry Wotton meant that he should tell a lie. This, no doubt, was only said as a witticism, but it illustrates my meaning. In the present case, the plaintiffs must shew that this invoice was sent to the broker, that he might represent to the buyer, or that the buyer might think, that these goods came to the defendants from an independent house, and that the defendants were not interested in the shipment of them. I think that was for the jury, and that there was some evidence for them on that point, although very slight. We therefore cannot make the rule absolute for entering a nonsuit, but we may grant a new trial on payment of costs.

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GURNEY, B.—I have not heard the whole of the argument on either side, but in as far as I have been able to form a judgment, I concur in what my learned Brothers have said.

Rule absolute for a new trial on the third count, on payment of costs.

The two first counts of the declaration having been struck out pursuant to the order of the Court, the cause was tried again before Lord Abinger, C. B., at the London Sittings after last Trinity Term. It then appeared that the contract was signed and completed on the 4th of April, 1840, and it was not until the 8th of April that the shipping invoice was received by Corrie & Co. from Liverpool, and shewn to the plaintiffs. Evidence was given by persons

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ported a sale by a house distinct from the consignee. It
was insisted for the defendants, that there was no evidence
to charge the defendants in an action of tort, and that the
exhibiting of the invoice to the plaintiffs, after the comple-
tion of the contract, could not be taken into consideration,
inasmuch as it was impossible that the plaintiffs could
thereby have been induced to make the purchase. The
Lord Chief Baron, in summing up, left it (in substance) to
the jury to say whether the defendants knowingly repre-
sented to the plaintiffs that the coffee was invoiced to them
by a distinct house, and the jury again found for the
plaintiffs. In Michaelmas Term, *R. V. Richards* obtained
a rule nisi for a new trial, on the ground that the action
should have been brought upon the contract, and not in
tort, the alleged representation being in truth, if anything,
a material part of the contract itself: but the cause was
compromised before the rule came on for argument.

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CASE against the defendants, three of the directors of the Woodside Ferry Company. The declaration stated, that the defendants, before and at the time of the delivery of the goods and chattels to them, and of the committing of the grievances thereafter mentioned, to wit, on the 26th of August, 1840, were possessed of a certain ferry across a certain arm of the sea called the River Mersey, from Woodside, in the county of Chester, to Liverpool, in the county of Lancaster; and thereupon afterwards, to wit, on &c., the plaintiffs, at the request of the defendants, then delivered to the defendants certain goods and chattels of the plaintiffs of great value, to wit, of the value of £10,000, to wit, a certain carriage, to wit, a phaeton and

Declaration in case against the owners of a ferry stated, that the defendants were possessed of a ferry across the river Mersey, from Woodside to Liverpool, and that the plaintiffs delivered to them certain goods, to wit, a phaeton, and certain jewellery and watches contained in it, to be by the defendants, for reward to them

in that behalf, taken care of and carried in a certain steam-boat from Woodside to Liverpool, *and there landed* for the plaintiffs; that the defendants accepted and received the said carriage so containing the said jewellery and watches from the plaintiffs, and it became their duty to take proper care of them while they remained in their custody, and in and about the carriage, conveyance, *and landing* of the same as aforesaid. Breach, that the defendants took such bad care of the said carriage, jewellery, and watches, and so negligently conducted themselves in and about the carriage, conveyance, *and landing* of the same, that they were injured.

Plea, that the plaintiffs did not deliver to the defendants, nor did they accept and receive from the plaintiffs, the goods in the declaration mentioned, to be by them carried and conveyed in the said steam-boat from Woodside to Liverpool, and *there landed* for the plaintiffs, for reward to them in that behalf, *modo et formâ*.

Held, that a contract to carry *and land* the carriage and jewellery, as stated in the declaration, could not be implied from the mere character of the defendants as owners of the ferry. But that it was a question for the jury, whether there was in fact a contract between the parties, either express or implied from usage, to receive the carriage on board, and to land it again at the end of the transit across the river.

It appeared that the plaintiff went on board the defendant's steam-boat, with his horse and carriage, paying the defendants' charge for a "light four-wheeled phaeton;" that jewellery and watches of great value, which much increased its weight, were contained in a box under the seat; and that he made no communication of that fact to the defendants. The carriage was taken safely across the river, and on the arrival of the boat at the pier head at Liverpool, two of the defendants' servants put the carriage out upon the slip, and commenced drawing it up the slip towards the quay, but in doing so were overpowered by its weight, and it ran down into the river, whereby the jewellery and watches were injured:—*Held*, that the plaintiff's right of action for this injury was not affected by his not having communicated the fact of the jewellery and watches being contained in the carriage:—*Held* also, that it was a further question for the jury (supposing a contract to land were established) whether the landing was complete under the above circumstances.

Held, also, that to rebut evidence of a usage to take on board and land the carriages of passengers, a notice stuck up at the door of entrance for foot passengers to the slip at Woodside, but not visible to those who came with carriages, nor shewn to have been known to the plaintiff,—that the defendants did not undertake to load or discharge horses or carriages, and would not be responsible for loss or damage thereto,—was not admissible.

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certain jewellery and watches, to wit, ten boxes of jewellery and five bags of watches, contained and being in the said carriage, to be by the defendants, for reward to them in that behalf, taken care of and carried and conveyed in a certain steam-boat, from Woodside aforesaid to Liverpool aforesaid, and there, to wit, at Liverpool aforesaid, landed for the plaintiffs; and the defendants, to wit, then took, accepted, and received the said carriage so containing the said jewellery and watches as aforesaid, of and from the plaintiffs, for the purposes aforesaid; and it then became and was the duty of the defendants to take due and proper care of the said carriage, jewellery, and watches, whilst they remained in their custody for the purposes aforesaid, and to take due and proper care in and about the carriage, conveyance, and landing of the same as aforesaid. Yet the defendants, not regarding their duty in that behalf, but contriving &c., afterwards, to wit, on &c., took so little and such bad and improper care of the said carriage, jewellery, and watches, whilst they remained in their custody for the purposes aforesaid, and took so little and such bad and improper care, and so negligently conducted themselves in and about the carriage, conveyance, and landing of the same as aforesaid, that the same then, by reason of the bad, imperfect, and improper conduct of the defendants, their mariners and servants, in that behalf, became and were very much broken, injured, wetted, &c. &c.

Pleas, first, not guilty; secondly, that the plaintiffs did not deliver to them the defendants, nor did they accept and receive from the plaintiffs, the said goods and chattels in the declaration mentioned, or any of them, or any part thereof, to be by the defendants carried and conveyed in the said steam-boat from Woodside aforesaid to Liverpool aforesaid, and there landed for the plaintiffs, for reward to them the defendants in that behalf, in manner and form &c. Thirdly, that the said goods and chattels in the declaration mentioned were delivered by the plaintiffs to, and

accepted and received by them the defendants, to be ferried across the said ferry in the declaration mentioned, and there landed and delivered to the plaintiffs, and the said reward in the declaration mentioned to them in that behalf was for and in respect of such ferryage, and landing and delivery, and for and in respect of nothing else. And the defendants further say, that at the time of the said delivery and acceptance and receipt of the said goods and chattels, that is to say, on the said 26th day of August, 1840, it was agreed by and between the plaintiffs and the defendants, as part of the terms of the said acceptance and receipt, that they the defendants were not to be in anywise answerable or accountable to the plaintiffs for any loss thereof or damage thereto which might occur in the course of the said ferryage and landing and delivery; and they the defendants then accepted and received the said goods and chattels to be so ferried and landed and delivered as aforesaid upon the terms of the said agreement, and upon no other terms whatsoever, whereof the plaintiffs then had knowledge and notice. And the defendants further say, that the said loss and damage of the said goods and chattels in the declaration mentioned happened and took place without any personal negligence or want of care whatsoever by the defendants themselves, and without any gross negligence or misfeasance of their mariners or servants, or otherwise howsoever. Verification.

The plaintiffs joined issue on the first and second pleas, and to the third replied *de injuriâ*, on which also issue was joined.

At the trial before *Wightman, J.*, at the Liverpool Summer Assizes, 1841, it appeared that the plaintiffs were jewellers at Birmingham, and that on the 26th of August, 1840, one of the plaintiffs, travelling on behalf of the firm, put on board one of the defendants' steam-boats at Woodside, to be carried across to Liverpool, a horse and phaeton, the latter of which contained, in the box seat, jewellery and watches of

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the value of several thousand pounds. The plaintiff paid 5s. for the ferryage of the phaeton and horse, which, according to the defendants' scale of charges, was the charge for "a light four-wheeled phaeton and one horse;" and he did not communicate the fact that the carriage contained any heavy or valuable property. The phaeton was carried safely over the river, and put out of the boat upon the slip at the Liverpool pier-head, and two of the defendants' servants endeavoured to draw it up the slip, but its weight overpowered them, and it ran back into the water, whereby the jewellery and watches were much injured. There was some conflict in the evidence as to the circumstances of the accident: according to the plaintiffs' witnesses, the men had drawn the phaeton some twenty yards up the slip before it ran back; and they stated also, that four men were necessary to bring it safely to the top of the slip: according to the evidence of the defendants' servants, they were overpowered by the weight of the carriage immediately on its being put out upon the slip, and on their endeavouring to turn it round for the purpose of being drawn up. The defendants' witnesses stated also, that the company did not pay their men for putting carriages or horses on board the boats, or landing them; that the servants from the Woodside hotel generally brought down the carriages to the boats, but that if the defendants' servants put them on board or landed them, the owners of the carriages paid them for doing so.

The defendants' counsel contended, upon this state of facts, first, that there was no obligation on the defendants, by reason of their ownership of the ferry as alleged in the declaration, to land the carriage out of the steam-boat, but only to carry it safely across the river; and secondly, that the plaintiff was bound to have communicated to the defendants the fact, that the phaeton contained the jewellery and watches, the weight of which had occasioned the accident. The learned Judge reserved the first question; and

in summing up, left it to the jury to say whether there was any negligence or want of care on the part of the defendants: saying, that if the defendants undertook to land the carriage, they must do it safely; and he expressed his opinion that the plaintiff was not bound to give notice of the contents of the carriage. The jury found for the plaintiffs, damages £211.

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In Michaelmas Term, *Knowles* obtained a rule nisi for a new trial, on the ground of misdirection. He contended, first, that the learned Judge ought to have directed the jury that the defendants were entitled to a verdict on the second issue, it being no part of their duty as owners of the ferry to land the carriage; secondly, that even if the defendants were bound to land the carriage, they did in fact land it, by putting it out of the boat upon the slip; and thirdly, that the plaintiff was bound to give notice that there was an extra weight, the reward to the defendants being applicable to the phaeton alone.

Kelly and *Crompton* shewed cause at the sittings after last Hilary Term (February 9).—The plaintiffs are entitled to retain their verdict. First, the declaration in this case is not founded on any duty in the defendants as owners of the ferry. They are liable upon their contract. If a ferryman, although not bound to do so, choose to receive goods to carry, he is liable like any other contractor. What took place in this case shews that the defendants were bound by their contract to land the carriage; if not, why did they set about doing it? they were not required to do so. Nor was there proof of any regular charge made against the owner of a carriage for putting on board or landing it. It was entirely a question of fact, what was the contract between the parties, and not at all a question of law. It is not as if the declaration had charged the defendants as common carriers, or as proprietors of the ferry, and as a deduction of law had alleged the duty; but this

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is an action founded upon a contract. Who is to land carriages from the defendants' boats but the servants of the defendants? the owners do not bring *their* servants to do it. And whether the men do this as the employees of the owner, or as the servants of the ferryman, is altogether a question of fact for the jury, and which the defendants ought to have required to be left to them.

In like manner, it is a mere question of fact what amounted to a landing within the contract. It is obvious that if the defendants were bound to land at all, they were bound to land *safely*; and why did they attempt to take the phaeton up the slip, unless because it was an ordinary part of their duty, under the contract, to land it safely on the top. The question of negligence was entirely for the jury; and whether the landing was over or not is part of the question of negligence. Landing without negligence is landing in a secure place.

Thirdly, the question as to the necessity of *notice* was also a question of fact. But the defendants could not avail themselves of this point without proof on their parts of some notice limiting their liability; in the absence of that, the law will not raise any such implied limitation. But again—if the injury arose from the plaintiffs' having thrown the defendants off their guard, by sending on board a carriage too heavily laden to be safely landed by the ordinary means, that negatived negligence on the part of the defendants; and the question of negligence was left to the jury.

Knowles and *Martin*, in support of the rule.—The only question left to the jury was, whether there was any negligence or want of care on the part of the defendants, and the question whether the landing was complete was never put to them. First, the defendants did not contract to carry the concealed jewellery, by which the weight of the carriage was doubled. There was nothing to draw their

attention to its contents, and the plaintiff paid only the charge for a "light phaeton." The defendants are not common carriers, but mere bailees for hire, and liable only for the want of reasonable care. The contract here was only to carry a phaeton, which required no extraordinary care. If they had known the additional weight, they might have exercised greater and adequate care in landing it. Before it can be said that a person in the situation of the defendants is guilty of negligence in carrying, it must appear that he knows what he is carrying, and therefore what degree of care is requisite to its security.

Secondly, the question whether the defendants contracted to *land* the carriage was not left to the jury; it was treated as a question of law. Now the only evidence of any contract at all was of a contract resulting from the defendants' situation and supposed duty as ferrymen. But the duty of a ferryman is only to supply a boat, to pass over passengers with their goods: *Termes de la Ley*; *Payne v. Partridge* (a). The ferryman never takes possession of the goods at all: they remain as much in the possession of the owner, as when a man drives over a bridge subject to a toll. It being, therefore, no part of his duty or contract as a ferryman to take the goods of the passengers into his possession, he is not chargeable in respect of their custody.—They were then stopped by the Court.

PARKE, B.—Unfortunately we cannot collect exactly in what mode this question was left to the jury, but all the Court are clearly of opinion that it is a question for the jury, whether there was a contract between these parties, implied by usage or otherwise, to receive this carriage into the defendants' care, to put it on board, and to land it again at the expiration of the transit. The question is whether there was any such contract existing between these

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parties, and I think the simple circumstance of the defendants being ferrymen would not give rise to the contract laid in this declaration, nor import an obligation on the ferryman to take the trouble, either of putting a carriage on board or discharging it out the vessel on her arrival. It might be such a ferry as that *by usage* the ferryman takes that obligation upon himself; and the question will be, whether there is such a usage in this case, and whether the defendants contracted, not merely to carry across the river, but to take the carriage into their care, and to land it in safety: and then will arise the further question, whether it was properly taken care of by being placed at the bottom of the slip, and in a place of security. This carriage was left standing at the bottom of the slip, and the question is whether it ought not to have been carried up the slip immediately, so as never to have been in a state of insecurity; and whether such would not be the defendants' duty in landing it. The questions, therefore, are, whether there was a contract, by virtue of which the defendants were to land the carriage at the expiration of the passage, and whether the landing was complete by placing it at the bottom of the slip, or whether they were not bound to take it up and put it on the quay. These are questions of fact, which should have been determined by the jury, and it does not appear to me that they have been satisfactorily left, so as to enable the jury to determine them.

With regard to the other objections made on the part of the defendants to this contract, we think they are not such as ought to prevail. There is no doubt that there was a delivery of the carriage and its contents, and that included the jewellery; the objection, therefore, urged by Mr. *Knowles*, that there was no delivery of the jewellery, cannot prevail. And I take it now to be perfectly well understood, according to the majority of opinions upon the subject, that if any thing is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary; if he ask no questions, and there be no

fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is. It is the duty of the person who receives it to ask questions; if they are answered improperly, so as to deceive him, then there is no contract between the parties; it is a fraud which vitiates the contract altogether. But in this case, if there was a delivery at all of the carriage, with the jewellery in it, it was a delivery to be carried for reward, namely, five shillings. The objections made on this ground, therefore, ought not to prevail: but we think there ought to be a new trial, in order to establish these two points: first, whether there was a delivery, as alleged in the declaration, of the carriage to the defendants; and secondly, whether the defendants entered into any contract, either express or implied, to land the carriage upon its arrival on the shore, and in what way such landing was to take place,—whether simply by leaving it at the bottom of the slip, or whether it was their duty, according to their contract, to carry it up the slip, and leave it on the pier-head. If such was their duty, the only remaining question will be, whether they were guilty of negligence in the performance of it. All these are questions to be disposed of by the jury, but it does not satisfactorily appear that they have at present decided upon them. The rule must therefore be made absolute.

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ALDERSON, B.—If the question in this case depended simply upon this, whether there were negligence in the defendants, and whether the carriage ought to have been carried up the slip by four instead of two persons, considering the weight of it, and considering the circumstances connected with it, which the defendants might fairly be considered to be acquainted with, I think the verdict ought not only not to be disturbed, but that it would have been perfectly right. But a further question for the consideration of the jury, and which ought to have been submitted to them, is, whether there is any evidence of the phaeton, including the

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jewellery, having been delivered to the defendants, to be carried by them on behalf of the plaintiffs. That is a question upon which the jury ought to have passed their judgment, and there is evidence by which they might have established that fact either one way or the other.

Then the next question will be, what was the nature of the alleged contract? Was it to carry across, or to carry across *and to land*? And a further question is as to the landing itself; whether they were guilty of negligence in landing. What is a landing? That is for the jury to determine. Is it putting the carriage on shore in a secure place, where it would remain in safety unless it were removed out of that position? If that is a landing, then it will be for the jury to say whether that has been done in the present case. Even supposing, however, that the putting it at the bottom of the slip only is a landing, I apprehend that if the defendants themselves do not leave it there, but proceed to drag it up the slip, and in that conduct themselves negligently, by not applying a sufficient force, they would still be liable, notwithstanding they would have landed it under the circumstances; because it may be considered as one and the same act, and the criterion is not the length of time that it rests in that position, but whether the parties who so placed it at the bottom of the slip desisted, and left the rest to be done by other persons. All these are questions upon which the jury ought to exercise their judgment.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

The case was again tried at the last Spring Assizes at Liverpool, before *Rolfe*, B., when it was proved to have been the invariable usage and custom for the defendants to land carriages put on board their steam-boats, for the

purpose of being conveyed over the ferry, on their arrival on the opposite side. The defendants, for the purpose of rebutting the inference of a contract on their part arising from this usage, tendered in evidence certain placards, containing a list of the charges and ferryages by the Woodside Ferry Company, subjoined to which was a notice that the proprietors did not undertake to load or discharge horses, carriages, &c., and *that they would not in anywise be responsible for any loss thereof or damage thereto*. These placards were proved to have been hung up on each side of the covered gate by which *foot* passengers entered the slip for the purpose of getting on board; but it appeared that the plaintiff, and other persons with carriages, went down to the boat by another entrance, at which there were no notices, and persons going in carriages could not see the notices at the foot passengers' gate. This evidence was objected to by the plaintiffs' counsel, and the learned Judge refused to receive it. The plaintiffs having again obtained a verdict, *Knowles*, in Easter term last, obtained a rule to shew cause why there should not be a new trial, on the ground that the above evidence ought to have been received; against which

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Baines and *Crompton* now shewed cause.—The evidence was properly rejected. It was proved at the trial, that it was the invariable usage of the defendants to land carriages ferried over in their boats, and from that usage a contract was properly inferred that they undertook safely to land the plaintiffs' carriage; and that cannot be affected by a notice stuck up under cover, in the entrance for foot passengers, which the plaintiff, going with a carriage, had no means of seeing, and which it was not shewn had come in any way to his knowledge. The evidence was therefore inadmissible; and if it had been admitted, must have been utterly valueless. The only way in which it could possibly be evidence, would have been for the purpose of explaining some of the facts

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which the plaintiffs had proved, as to the custom of landing carriages; but it could not affect that question, because the evidence shewed that the notice was so placed, that it could not be seen by persons going with carriages. If these placards were admissible in evidence, they would be equally receivable if they had been proved to have been stuck up in the most remote part of Liverpool. The plaintiffs' evidence was confined to acts done by the defendants, and did not include declarations to or by third persons; and this being a mere declaration by writing, it could not be used to explain the plaintiffs' case, and could not be any evidence against them, unless it were shewn in some way to have come to their knowledge.

Knowles and Martin, in support of the rule.—This was not an action against the defendants as common carriers, but upon a contract safely to carry and land the plaintiffs' carriage; and the onus of proving that contract lay upon the plaintiffs. The defendants admit, if it had been otherwise, that this would not have been evidence, because in that case they could not have affected the plaintiffs without shewing notice to them. But here, if there is any contract, it is one to be inferred from the general conduct of the defendants in their dealing with the public. Of that conduct the putting up of these placards formed an important part, and must be taken into consideration as restricting their liability. It is admitted that the defendants cannot in this way establish a new contract to cut down another; but the object of this evidence was not to cut down any contract established by the plaintiffs' evidence, but to explain the course of dealing from which a contract was sought to be inferred, and to shew what that really was. The plaintiffs seek to establish a contract from the conduct of the defendants with respect to unknown persons, and from certain acts done by them: and this is not to be restricted to such facts only as make against

them. The exhibiting of this placard was an important part of their conduct, and was legitimate evidence to rebut the contract sought to be established.

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LORD ABINGER, C. B.—This is a very clear case. It was established by an irresistible body of evidence, that it was the practice of the defendants to land carriages passing over the ferry, so as to support the contract set forth in the declaration; and in order to meet that evidence, the defendants proposed to read these notices. In general, in cases of this nature, it is usual to give some evidence of the probability that the parties were made acquainted with the contents of such notices, as by shewing that the notice was inserted in a newspaper the plaintiff was in the habit of taking, or in a public office he was in the habit of frequenting; and I see no reason for an exception in this instance, for it appeared here that it was not at all likely that any parties who brought carriages could see these placards. As to the plaintiff himself, it is quite clear that there was no evidence to shew that he did see them, or even that it was probable that he could have done so. The evidence, therefore, was properly rejected.

ALDERSON, B.—I am of the same opinion. The acts proved by the plaintiffs, upon which they relied to substantiate the existence of a contract, were those done with respect to persons bringing carriages. These notices were stuck up in the way for foot passengers, and it appeared that the plaintiff did not go by that way; neither was it shewn that any person with a carriage ever went by it. No reasonable probability, therefore, existed that the plaintiff, or any parties going with carriages, ever saw them.

GURNEY, B., concurred.

ROLFE, B.—The defendants expressly admitted on the

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trial, that they could not bring home to the plaintiff notice of these placards; but it now seems to be contended, that notice of them, even to third persons, would render them admissible. If it had been shewn that these notices had been seen by a considerable number of the public bringing over carriages, there might have been some pretence for saying that they ought not to have been rejected; but this was not suggested, neither is there a particle of evidence of such a fact. On the contrary, all the evidence shewed, that, with respect to such persons, it was just the same as if the notices had been kept in the desks of the company.

Rule discharged.

June 8.

WILLIAMS, Executor, v. WILLIAMS.

The indorsement on a second or subsequent writ of summons, issued under the 2 Will. 4, c. 39, s. 10, to save the Statute of Limitations, must contain a memorandum, specifying the date, not only of the first writ, but of the return thereto.

ASSUMPSIT by the plaintiff, as executor of H. R. Williams, deceased, on a promissory note for 55*l.* 10*s.*, made by the defendant, dated the 26th November, 1831, payable to the testator or his order, six months after date. There was also a count on an account stated with the testator in his lifetime.

The defendant pleaded the Statute of Limitations; to which the plaintiff replied, that heretofore, and in the lifetime of the said H. R. Williams, deceased, and after the passing of a certain act of Parliament, passed in the 2 Will. 4, intituled, "An Act for Uniformity of Process," &c., to wit, on the 24th day of October, 1837, the defendant, being indebted to the said H. R. Williams, deceased, in respect of the promises and causes of action in the declaration mentioned, the said H. R. Williams, for the recovery of his damages sustained on occasion of the non-performance by the defendant of the said several promises in the declaration mentioned, sued and prosecuted out of the court of our Lady the Queen, before the Barons of her

Exchequer at Westminster, a certain writ close of our said Lady the Queen, called a writ of summons, bearing date the day and year aforesaid, whereby our said Lady the Queen commanded the defendant, therein described of Wernlasdeg, in the county of Carnarvon, that within eight days after the service of the said writ on him, inclusive of the day of such service, he should cause an appearance to be entered for him in her said Majesty's said Court of Exchequer of Pleas at Westminster, in an action on promises at the suit of the said H. R. Williams, deceased, and that he should take notice, that in default of his so doing, the said H. R. Williams might cause an appearance to be entered for him, and proceed therein to judgment and execution; which said writ bore date on the day on which the same was issued, to wit, on the day and year aforesaid, was tested in the name of James Lord Abinger, Lord Chief Baron of the said Court, and was indorsed with the names and place of abode of Henry Weeks and William Gilbertson, the attornies suing out the same, and to which said writ was subscribed a memorandum that the same was to be served within four calendar months from the date thereof, including the day of such date, and not afterwards. And the plaintiff further says, that afterwards, within one calendar month next after the expiration of the said writ, including the day of such expiration, to wit, on the 1st day of March, A.D. 1838, came before the Court the said H. R. Williams, by Henry Weeks and William Gilbertson, his attornies as aforesaid, and offered himself against the defendant in the action aforesaid, and the said Henry Weeks and William Gilbertson, the attornies who sued out the said writ, then and there returned that the defendant was not found in the said county of Carnarvon, or within 200 yards of the border thereof, and the defendant did not come, and had not appeared to the said action, according to the exigency of the said writ; and the said writ, with such return as aforesaid,

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was then, and within one calendar month next after the expiration thereof, including the day of such expiration, entered of record, according to the directions of the said statute: And thereupon the said H. R. Williams, by his said attornies, prayed another writ of our said Lady the Queen to be issued out of the said Court there against the defendant, in continuance of the said first-mentioned writ, and it was granted to him, &c.: And thereupon our said Lady the Queen, within one calendar month next after the expiration of the said first-mentioned writ, including the day of such expiration, to wit, on the day and year last aforesaid, issued forth her other writ, in continuance of the said first-mentioned writ close, whereby our said Lady the Queen commanded the defendant, therein described as of Wernlasdeg, in the county aforesaid, as before she had commanded him, that within eight days after the service of the said writ on him, inclusive of the day of such service, he should cause an appearance to be entered for him in her said Court of Exchequer of Pleas at Westminster, in an action on promises at the suit of the said H. R. Williams, and that he should take notice, that in default of his so doing the said H. R. Williams might cause an appearance to be entered for him, and proceed thereon to judgment and execution; which said writ bore date the day on which the same was issued, to wit, on the day and year last aforesaid, and was tested in the name of James Lord Abinger, Lord Chief Baron of the said Court, and was indorsed with the names and place of abode of the said Henry Weeks and William Gilbertson, the attornies actually suing out the same, and to which said writ was subscribed a memorandum, that the same was to be served within four calendar months from the date thereof, including the day of such date, and not afterwards; and which said last-mentioned writ contained a memorandum indorsed thereon, specifying the day of the date of the said first-mentioned writ, &c., according to the said directions of the said statute.

[The replication then, after stating the return and recording of this writ, and the issuing of various other writs in continuation of it, which were set forth with similar memoranda and returns (a), stated the death of the testator during the pendency of a writ, the abatement of the proceedings thereby, the commencement of the present action within one year after his death, and concluded with the ordinary verification, but without any verification of the several writs by the record.]

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Special demurrer, assigning the following amongst other causes:—For that it is stated and relied on in the said replication, that the said H. R. Williams, by Henry Weeks and William Gilbertson, made several returns therein mentioned, whereas by law one person cannot appear or sue out a writ, or make returns thereto for the purpose of preventing the operation of the Statute of Limitations, by more than one attorney:—For that the replication alleges, that the said writs, except the first, contained a memorandum indorsed thereon, specifying the day of the date of the said first-mentioned writ, &c., according to the directions of the said statute; whereas it ought to have been shewn, that in each case the memorandum specified the day of the date of the next preceding writ:—For that the said replication, in the last-mentioned allegation, uses the word or formula “&c.” and the defendant is unable to infer therefrom what was included in the said memorandum in each instance, besides the day of the said date:—For that the said replication alleges and relies on several writs and returns, and on the entries of record thereof, and the replication ought in each instance to have verified the said writ and return, and the said entry, by the record;

(a) In the course of the case, *Alderson*, B., suggested that it would be better for the future, instead of setting out all the writs, which might be, as in this case, many in number, to set out only the first and second, and state the rest to have been in the same form as the second.

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 to the record thereof respectively, whereas he omits to do
 so, and in lieu thereof concludes his replication with the
 common verification.

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Joinder in demurrer.

Jervis, in support of the demurrer.—The first objection to this replication arises on the words of the Uniformity of Process Act, 2 Will. 4, c. 39, the 10th section of which requires that the returns to writs of summons sued out to prevent the operation of the Statute of Limitations, shall be made “by the plaintiff or his attorney suing out the same.” Here the plaintiff has appeared and made the return by two attornies. A party cannot appear by two attornies: such an appearance is a nullity. [Lord *Abinger*, C. B.—No; it is at most a mere irregularity: the defendant is in no way injured. *Alderson*, B.—There is no averment that they are distinct persons; and without that it is only bad grammar.] Next, the indorsement on the second and subsequent writs should have contained a memorandum, not only of the date of the first writ, but also of the date of its return. The same section of the statute requires, that every writ issued in continuation of a preceding writ, shall contain a memorandum indorsed thereon or subscribed thereto, “specifying the date of the first writ and return;” and it then goes on, parenthetically as it were, to point out by whom the return shall be made: viz.—“to be made, in bailable process, by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be.” The plaintiff has fallen into the mistake, from the circumstance, that in the ordinary copies of the act of Parliament the punctuation is inaccurate, a semicolon being placed after the word writ, thus:—“specifying the day of the date of the first writ; and return to be made by” &c. &c. In order to avoid the

difficulty of construing the statute, the plaintiff has substituted an "&c.," in his replication, for the proper allegation as to the form of the memorandum: but on special demurrer, the Court cannot supply the requisite allegation by means of the "&c." Thirdly, the third and subsequent writs ought to have mentioned the date and return of *each* of the prior writs: the words "first writ," mean every first or previous writ. [*Alderson, B.*—It only means that they shall shew when the action was commenced.] Again, as these writs are stated to be recorded, the replication ought to have contained a verification of them by the record.—The Court then called on

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Atherton to support the replication.—It is submitted that the proper construction of the 10th section is, to require only a memorandum of the date of the first writ, and not of the date of its return also, to be made on the subsequent writs; and that the words, "and return to be made," must be read, "which return is to be made." If this be not so, the words, "to be made," must have reference to the last preceding nominative antecedent, namely, "memorandum," the effect of which is, that the entire memorandum is to be made, in bailable process, by the sheriff or his successor, who might know nothing of the date of the first writ or its return, where it had been lodged with and returned by his predecessor in office. [*Alderson, B.*—If you read it as only requiring the return to be made, you make it perfectly good sense, without any addition. The memorandum is to contain the dates both of the writ and of its return, whence it may appear that it has been returned within one month. You had better amend.]

Atherton, accordingly prayed leave to amend, which was granted on payment of costs: otherwise,

Judgment for the defendant.

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June 8.

TURQUAND and Others, Assignees of BARTHOLOMEW VANDERPLANK and SAMUEL VANDERPLANK, Bankrupts, v. SAMUEL VANDERPLANK.

A. and B., brothers, being partners in trade, and B. being largely indebted to the partnership, B. borrowed £500 from a loan company, which was secured by a bond of C. (the uncle of A. and B.) and two other persons, and by a policy of assurance on B.'s life. Of this sum B. paid £400 into the partnership funds. B. afterwards executed a warrant of attorney in favour of C., to indemnify him against the consequences of the bond. B.

having made default in payment of the premiums on the policy of assurance, the loan company called on C. for payment under this bond; whereupon C. entered up judgment on the warrant of attorney against B., and issued a *fi. fa.* thereon, which was levied on the partnership effects on the 5th August 1840. At that time A. and B. were in a state of hopeless insolvency. On the 7th August, another *fi. fa.*, at the suit of another creditor, was issued against B., and levied on the partnership effects. On the 8th August, A., in the name of the partnership, indorsed and delivered to C., on account of his claim against B., bills of exchange drawn by A. and B. for £81, which were paid at maturity; and on the 10th, A. paid to C. on the same account, out of the monies of the firm, a further sum of £80 in cash. On the 11th, a docket was struck against A. and B., and on the 12th a fiat issued against them, grounded on an act of bankruptcy committed on the 5th of August, and on the 13th they were duly adjudged bankrupts.

Held, that the assignees were entitled to recover from C. the amount of the payments so made to him on the 8th and 10th of August, and that they were not protected by the stat. 2 & 3 Vict. c. 29, not being payments really and *bonâ fide* made within the meaning of that statute, even though C. were assumed to have received them without notice of the bankruptcy.

Semble, (per Alderson, B.), that a mere *payment* by a bankrupt to a creditor, after the act of bankruptcy, is not a contract, dealing, or transaction within the meaning of the 2 & 3 Vict. c. 29, but that the case of such a payment is still governed by the 6 Geo. 4, c. 16, s. 81.

Quære, whether these were payments made by way of fraudulent preference within that section.

THIS was an action of assumpsit, to recover the sum of 169*l.* 3*s.*, and such amount for interest as the Court shall award.

The declaration contained a count for money had and received by the defendant to the use of the bankrupts before their bankruptcy, and a count upon an account stated between the defendant and the bankrupts; and it also contained counts for money had and received by the defendant to the use of the plaintiffs as assignees, for interest due from the defendant to the plaintiffs as assignees, and upon an account stated between them. To this the defendant pleaded,—first, non assumpsit; secondly, that the plaintiffs were not assignees of the estates and effects of the said Bartholomew Vanderplank and Samuel Vanderplank; and thirdly, that the said Bartholomew Vanderplank and Samuel Vanderplank were not bankrupts in manner and form alleged.

The cause came on to be tried before Lord *Abinger*, C. B., at the sittings after last Trinity term, and after the opening address of the counsel for the plaintiffs, it was suggested by his Lordship, that, as the facts of the case were almost wholly undisputed, it should be left to the Court of Exchequer to determine in what manner the verdict should be entered, the Court to be at liberty to draw such inferences from the facts as it might deem just and reasonable. Accordingly a verdict was entered for the plaintiffs, subject to the following case :—

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The defendant is the uncle of the bankrupts, Bartholomew and Samuel Vanderplank, of whose estate the plaintiffs are assignees. The bankrupts, until immediately before the bankruptcy, carried on, in co-partnership, the business of woollen drapers, in Saville Row. On or about the 5th January, 1839, Bartholomew Vanderplank, one of the bankrupts, borrowed of the Victoria Assurance and Loan Company the sum of £500, and effected a policy of assurance in that office for £1000 upon his life. The premiums on the policy, amounting to £25 per annum, were payable half-yearly, in July and January in each year, or within thirty days afterwards. To secure the re-payment of the £500, and the interest thereon, and the premiums by half-yearly payments during the continuance of the loan, the defendant in this action and his brother, John Vanderplank, together with one Richard Grant, entered into a joint and several bond, as sureties to the trustees of the Victoria Assurance and Loan Company. Richard Grant, one of such sureties, received a guarantee from John Vanderplank, to indemnify him from all claims in respect of the joint and several obligations. Of the £500 thus raised, £400 was paid by Bartholomew Vanderplank into the partnership funds, and £100 was lent by him to the said Richard Grant, who was a customer of the house, but at the time Bartholomew Vanderplank made that payment into the partnership funds, he was largely indebted to the partner-

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which the plaintiffs had proved, as to the custom of landing carriages; but it could not affect that question, because the evidence shewed that the notice was so placed, that it could not be seen by persons going with carriages. If these placards were admissible in evidence, they would be equally receivable if they had been proved to have been stuck up in the most remote part of Liverpool. The plaintiffs' evidence was confined to acts done by the defendants, and did not include declarations to or by third persons; and this being a mere declaration by writing, it could not be used to explain the plaintiffs' case, and could not be any evidence against them, unless it were shewn in some way to have come to their knowledge.

Knowles and *Martin*, in support of the rule.—This was not an action against the defendants as common carriers, but upon a contract safely to carry and land the plaintiffs' carriage; and the onus of proving that contract lay upon the plaintiffs. The defendants admit, if it had been otherwise, that this would not have been evidence, because in that case they could not have affected the plaintiffs without shewing notice to them. But here, if there is any contract, it is one to be inferred from the general conduct of the defendants in their dealing with the public. Of that conduct the putting up of these placards formed an important part, and must be taken into consideration as restricting their liability. It is admitted that the defendants cannot in this way establish a new contract to cut down another; but the object of this evidence was not to cut down any contract established by the plaintiffs' evidence, but to explain the course of dealing from which a contract was sought to be inferred, and to shew what that really was. The plaintiffs seek to establish a contract from the conduct of the defendants with respect to unknown persons, and from certain acts done by them: and this is not to be restricted to such facts only as make against

them. The exhibiting of this placard was an important part of their conduct, and was legitimate evidence to rebut the contract sought to be established.

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LORD ABINGER, C. B.—This is a very clear case. It was established by an irresistible body of evidence, that it was the practice of the defendants to land carriages passing over the ferry, so as to support the contract set forth in the declaration; and in order to meet that evidence, the defendants proposed to read these notices. In general, in cases of this nature, it is usual to give some evidence of the probability that the parties were made acquainted with the contents of such notices, as by shewing that the notice was inserted in a newspaper the plaintiff was in the habit of taking, or in a public office he was in the habit of frequenting; and I see no reason for an exception in this instance, for it appeared here that it was not at all likely that any parties who brought carriages could see these placards. As to the plaintiff himself, it is quite clear that there was no evidence to shew that he did see them, or even that it was probable that he could have done so. The evidence, therefore, was properly rejected.

ALDERSON, B.—I am of the same opinion. The acts proved by the plaintiffs, upon which they relied to substantiate the existence of a contract, were those done with respect to persons bringing carriages. These notices were stuck up in the way for foot passengers, and it appeared that the plaintiff did not go by that way; neither was it shewn that any person with a carriage ever went by it. No reasonable probability, therefore, existed that the plaintiff, or any parties going with carriages, ever saw them.

GURNEY, B., concurred.

ROLFE, B.—The defendants expressly admitted on the

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trial, that they could not bring home to the plaintiff notice of these placards; but it now seems to be contended, that notice of them, even to third persons, would render them admissible. If it had been shewn that these notices had been seen by a considerable number of the public bringing over carriages, there might have been some pretence for saying that they ought not to have been rejected; but this was not suggested, neither is there a particle of evidence of such a fact. On the contrary, all the evidence shewed, that, with respect to such persons, it was just the same as if the notices had been kept in the desks of the company.

Rule discharged.

June 8.

WILLIAMS, Executor, v. WILLIAMS.

The indorsement on a second or subsequent writ of summons, issued under the 2 Will. 4, c. 39, s. 10, to save the Statute of Limitations, must contain a memorandum, specifying the date, not only of the first writ, but of the return thereto.

ASSUMPSIT by the plaintiff, as executor of H. R. Williams, deceased, on a promissory note for 55*l.* 10*s.*, made by the defendant, dated the 26th November, 1831, payable to the testator or his order, six months after date. There was also a count on an account stated with the testator in his lifetime.

The defendant pleaded the Statute of Limitations; to which the plaintiff replied, that heretofore, and in the lifetime of the said H. R. Williams, deceased, and after the passing of a certain act of Parliament, passed in the 2 Will. 4, intituled, "An Act for Uniformity of Process," &c., to wit, on the 24th day of October, 1837, the defendant, being indebted to the said H. R. Williams, deceased, in respect of the promises and causes of action in the declaration mentioned, the said H. R. Williams, for the recovery of his damages sustained on occasion of the non-performance by the defendant of the said several promises in the declaration mentioned, sued and prosecuted out of the court of our Lady the Queen, before the Barons of her

Exchequer at Westminster, a certain writ close of our said Lady the Queen, called a writ of summons, bearing date the day and year aforesaid, whereby our said Lady the Queen commanded the defendant, therein described of Wernlasdeg, in the county of Carnarvon, that within eight days after the service of the said writ on him, inclusive of the day of such service, he should cause an appearance to be entered for him in her said Majesty's said Court of Exchequer of Pleas at Westminster, in an action on promises at the suit of the said H. R. Williams, deceased, and that he should take notice, that in default of his so doing, the said H. R. Williams might cause an appearance to be entered for him, and proceed therein to judgment and execution; which said writ bore date on the day on which the same was issued, to wit, on the day and year aforesaid, was tested in the name of James Lord Abinger, Lord Chief Baron of the said Court, and was indorsed with the names and place of abode of Henry Weeks and William Gilbertson, the attornies suing out the same, and to which said writ was subscribed a memorandum that the same was to be served within four calendar months from the date thereof, including the day of such date, and not afterwards. And the plaintiff further says, that afterwards, within one calendar month next after the expiration of the said writ, including the day of such expiration, to wit, on the 1st day of March, A.D. 1838, came before the Court the said H. R. Williams, by Henry Weeks and William Gilbertson, his attornies as aforesaid, and offered himself against the defendant in the action aforesaid, and the said Henry Weeks and William Gilbertson, the attornies who sued out the said writ, then and there returned that the defendant was not found in the said county of Carnarvon, or within 200 yards of the border thereof, and the defendant did not come, and had not appeared to the said action, according to the exigency of the said writ; and the said writ, with such return as aforesaid,

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instalment of £500, with costs, to be paid on the 11th of August then next, the remainder of the debt to be paid by instalments of £500 each, on the 11th of every succeeding month, which order was afterwards drawn up in the following words:—

<p>“ Evill v. Vanderplank and Another.”</p>	}	<p>Upon hearing the attornies or agents on both sides, and by consent, I do order that upon payment of 3913<i>l.</i> 1<i>s.</i> 11<i>d.</i>, the debt due from the defendants to the plaintiff, for which this action is brought, together with legal interest from the date hereof, with costs, to be taxed and paid as follows; viz. £500 on the 11th day of August instant, £500 on the 11th day of September next, and the like sum of £500 on the 11th day of every succeeding month till the whole of the said debt, interest, and costs, shall be paid, all further proceedings in this cause be stayed. And I further order, that in case default be made in payment as aforesaid, the plaintiff be at liberty to sign final judgment and issue execution for the amount, with costs of judgment and execution, sheriff's poundage, officer's fees, and all other incidental expenses. Dated the 8th day of August, 1840.</p>
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“ J. B. BOSANQUET.”

On the same day, (8th August) Samuel Vanderplank, one of the bankrupts, but in the name of the partnership, indorsed and delivered to the defendant, on account of his claim against Bartholomew Vanderplank, as surety to the Victoria Loan and Assurance Company, and the execution in respect thereof, two bills of exchange, both drawn by Bartholomew and Samuel Vanderplank, the bankrupts, the one for £50 and the other for 31*l.* 3*s.*, which were respectively paid by the several acceptors at maturity, before the commencement of this action. On the 10th of August, being the day on which the docket for the fiat against the bankrupts was struck, the said Samuel Vanderplank also paid on the same account to the defendant, out of the monies of the firm, the sum of £80 in cash, and neither

the sheriff nor his officer in possession had any notice of the aforesaid payments, or either of them. On the same day, (11th August, 1840), a docket was struck against the bankrupts. On the 12th August, 1840, Mr. Evill (default having been made in payment, on the day preceding, of £500) caused judgment to be signed by virtue of the said order, and on the same day execution was issued and levied thereon for the sum of 3918*l.* 11*s.* 1*d.* and costs, against the goods and effects of the said Bartholomew and Samuel Vanderplank, but that judgment and execution were afterwards set aside by this Court. On the same day, (the 12th August, 1840), a fiat in bankruptcy was issued against them on the petition of one of the plaintiffs, Samuel Symonds the elder, upon the docket which had been struck on the preceding day. At the time the fiat was issued, there were the two executions against Bartholomew Vanderplank levied upon the partnership property, that is to say, the joint execution of the defendant and his brother, and that of Seabrooke and Fagg. On the 13th August, 1840, the said Bartholomew and Samuel Vanderplank were adjudged bankrupts, and on the 14th of August the defendant was examined under the fiat before Mr. Commissioner Fane. The following is a copy of the deposition then taken :—

“ Samuel Vanderplank, of Long Buckby, Northamptonshire, grazier, the uncle of the bankrupts, being sworn and examined, upon his oath saith :—I have since the month of April last conducted my brother John Vanderplank’s business, as a cloth worker, in Bartholomew Close, my brother being himself ill. Large quantities of woollen goods have been brought to and removed from my brother’s premises, and no account was taken by me of such goods. My brother’s carts were occasionally employed for the removal of such goods, but they were generally called for. I recollect one quantity was sent by my brother’s carts, I think to Messrs. Morrison’s, in Fore-street, which

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came back. There are at present two ends of cloth at my brother's premises, belonging to the bankrupts. There are besides fourteen or sixteen short lengths in the top shop at my brother's premises, which also belong to the bankrupts, as I believe, (I have only specified the quantity from guess, there may be more or less than I have mentioned). Besides those, three pieces of goods were brought in yesterday, which I believe belong to the bankrupts. Mr. Smith, my brother's servant or clerk, requested me to let them be there, and as I thought he said they belonged to Mr. Baldwin, I afterwards inquired of my brother's carman who brought them in, and he said he had got them from a person of a different name, which I cannot at present recollect, and that he understood they had been sent out by the bankrupts on approbation. I hold the documents relating to a ship called the Columbine, which belong to the bankrupts; I lent them £600 on the security of that ship, and for that sum I have a mortgage. The documents are at present in the country, as I believe, but I am not quite certain of that. Mr. Thomas, of Tokenhouse-yard, prepared that mortgage; that transaction, as I best recollect, was about the beginning of July; I then paid the money over to Samuel Vanderplank. I have had no other dealings with the bankrupts, save that I have had occasionally a short length of cloth, to make a coat or the like, from the bankrupts. I sent in an execution against the effects of Bartholomew Vanderplank for £500 and interest, a few days since; that execution was sent in at the suit of my brother John and myself; the execution was sent in upon a warrant of attorney, which had been given to me by my brother John, by way of security against our liability as sureties of Bartholomew Vanderplank, for the sum of £500, to the Victoria Life Assurance and Loan Company; but I have not, nor has my brother John, made any payment to the said company on account of Bartholomew Vanderplank, but application has been

recently made to me as one of his sureties. I am not in partnership with my brother John, nor have we any joint property. Bartholomew Vanderplank used to keep wine in John Vanderplank's cellar, but I do not know if he has any wine there at present, and nothing shall be removed by or for the bankrupts without the assent of the official assignee. The bankrupts did not, as I know of, keep any books at Bartholomew Close. I know nothing of their affairs further than I have disclosed.

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"SAMUEL VANDERPLANK."

"I have before stated that I am not in partnership with my brother John, but I wish to add that I am jointly liable with my brother John, as the surety for Bartholomew Vanderplank to the said Victoria Insurance Company, and that Mr. Grant, of Piccadilly, is also liable with us in that matter.

"SAMUEL VANDERPLANK."

On the morning of the 14th August, 1840, the said Bartholomew Vanderplank called on the defendant, and paid him the sum of 308*l.* 16*s.*, in further liquidation of the execution. The defendant accepted the last-mentioned sum, and refused for some time to refund it, alleging that his execution having been levied before the bankruptcy, he was entitled to be paid; but subsequently, under the advice of his attornies, he paid it back to the assignees. The execution at the suit of the defendant and John Vanderplank, was afterwards withdrawn. On the 4th of September, 1840, the defendant paid to the Victoria Assurance and Loan Company, the sum of £500 principal, and 16*l.* 10*s.* interest, in discharge of the bond which he had given.

When the bankrupts passed their last examination, it appeared that Bartholomew Vanderplank was indebted to the partnership in the sum of £2000 and upwards.

The present action is brought to recover the sum of 161*l.* 8*s.*, being the aggregate amount of the sums paid to the defendant on the 8th and 11th of August, 1840, as

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1842. shall be found for the plaintiffs.

TURQUAND The fiat was grounded on an act of bankruptcy, which
v. was proved by one Thomas Taylor, the bankrupts' clerk, to
VANDERPLANK. have taken place on the 5th day of August, 1840, by the bankrupts absenting themselves with the intent to delay their creditors from time to time. The question reserved for the opinion of the Court is, in what manner the verdict shall be entered on the first issue; and if for the plaintiffs, for what amount.

Erle, for the plaintiffs.—The payments made to the defendant on the 8th and 10th of August, to which the present question is confined, cannot be supported. In the first place, they were made in part discharge of the private debt of one of the bankrupts, who at the time was largely indebted to the firm. It will be said that, inasmuch as Bartholomew Vanderplank brought into the concern part of the money which was raised for him by the defendant, his partner might lawfully join in paying this debt out of the partnership funds. But by paying in the sum of £400, being then largely indebted to the partnership, he could not create any obligation on his partner to satisfy any part of the debt. The sheriff could take no part of the partnership property to satisfy his separate debt, so long as the joint creditors were unsatisfied: yet the bankrupt, Samuel Vanderplank—the bankrupts having then an execution on their premises at the suit of another creditor—voluntarily hands over to the defendant the two bills mentioned in the case, which were part of the assets of the partnership. If this was done by way of fraudulent preference, or it was not a bonâ fide payment, or the defendant had notice at the time of the act of bankruptcy, this payment was not protected. [He then commented upon the facts, to shew that the defendant must have been cognizant of the act of bankruptcy.] But whether a pay-

ment amount to a fraudulent preference, depends on what passes in the mind of the bankrupt: and it is clear that this was a voluntary and wilful misapplication of the partnership funds by one partner to pay the debt of the other. This execution, therefore, is not protected by the stat. 2 & 3 Vict. c. 29, being founded on a warrant of attorney given by way of fraudulent preference. Nor was the payment protected by the 6 Geo. 4, c. 16, s. 81, which protects only payments made bonâ fide in the ordinary course of business.

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Kelly, contra.—This was not a transaction of such a nature as to come within the prohibition of the law relating to fraudulent preference, for the defendant was no creditor of the firm. The only question is, whether it was not a bonâ fide payment, or delivery of bills, made for good consideration. Here the defendant was a bonâ fide creditor of one of the two partners, and issues an execution upon his judgment against that one only: then the firm makes a payment in part satisfaction of that levy. There is nothing in the bankrupt law to defeat such a transaction. It is no payment by the partnership to *their* creditor. The 6 Geo. 4, c. 16, s. 81, which extends only to payments made to creditors of the bankrupts, has therefore no application here. But the transaction is protected by the 2 & 3 Vict. c. 29. The substance of it is, that it is a payment made for the purpose of getting rid of a valid execution. To take such a case out of the protection of that statute, there must be mala fides on the part of the person to whom the payment is made; and it is not sufficient that it is not intended bonâ fide on the part of the bankrupt: *Cook v. Caldecott (a)*. And here the transaction clearly was bonâ fide throughout on the part of the defendant. [He then entered into a detail of the facts, in order to shew this to be the case.] This branch of the bankrupt laws was in-

(a) Moo. & M. 522.

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tended to protect all transactions in which the parties who take the benefit of them are free from fraud. With respect to the bankrupt, all transactions entered into by him when in a state of hopeless insolvency, may be said to be *malâ fide*; and therefore a very insufficient protection would be afforded by the law, unless it extends to cases where, although not *bonâ fide* on the part of the bankrupt, the transaction is so in the other party. The whole object of this statute was to extend and enlarge the protection given by the former acts to parties dealing with persons who have become bankrupt, without notice of the bankruptcy. [*Alderson, B.*—According to your construction, the words “really and *bonâ fide*” would be useless with reference to payments; for when does a creditor receive payment of his debt *malâ fide*? Wherever payments are mentioned in the 6 Geo. 4, c. 16, it is “payments *bonâ fide made*,”—not “*received*.” *Payment* is an act done entirely by the bankrupt. It is different from the case of a fraudulent *sale*; there something is done on both sides; there may therefore be a fraudulent sale, but an honest purchase; but payment being a thing done entirely by the bankrupt, and if it be *malâ fide* in him, it is *malâ fide* altogether.] This was not merely a payment, but a payment on consideration, the object of it being to buy out the execution. [*Alderson, B.*—I doubt whether it is either a “contract, dealing, or transaction” within the 2 & 3 Vict. c. 29; it is a mere payment by the bankrupt, for which nothing passes from the defendant.]

Erle, in reply, was stopped by the Court.

LORD ABINGER, C. B.—This is a case properly for the consideration of a jury, and perhaps it ought not to have been made a special case at all. But I am of opinion, in whatever point of view we regard the case, that the plaintiffs are entitled to retain their verdict. Putting the question of fraudulent preference out of consideration, this was

a payment of the funds belonging to the assignees, to a party not a creditor of the firm, and therefore having no claim upon them. We must take it upon the facts as they appear upon the case, that these persons both foresaw that they must in a very short time be bankrupts, and were taking means to satisfy the claims of parties for whom they had most regard. It is not, then, a case between debtor and creditor, nor within the law relating to fraudulent preference, but a mere misapplication of the funds of the assignees (who are entitled to them by relation, unless the case could be brought within the statute of Victoria) to the payment of a debt of one of the bankrupts not then due. [His Lordship then remarked upon the facts as leading strongly to the conclusion, that it was a concerted scheme between the bankrupts and the defendant, to put in the execution in order to give a priority to the defendant.] But however this be, still, as this is not a case in which the assignees are affected by the recent statute, the judgment being on a warrant of attorney, it is a case in which they are entitled by relation. It appears to me to be a mere fraudulent contrivance to apply the partnership property to the payment of a person not a creditor of the partnership, and who had no claim whatever on its funds.

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ALDERSON, B.—I am of the same opinion. It appears to me to be one of the clearest cases I ever saw. The assignees are entitled to this money from the 5th of August, unless the defendant can shew that the payment of it is protected by some clause of some statute which operates to defeat that relation. He relies on the stat. of 2 & 3 Vict. c. 29, which protects "all contracts, dealings, and transactions by and with any bankrupt really and bonâ fide made and entered into" before the fiat, and all executions and attachments against the lands or goods of the bankrupt bonâ fide executed and levied before the fiat, "provided the person or persons so dealing with such bankrupt, or at

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whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy." Now is this a *contract*? certainly not. It is a strong use of the word *dealing* to say it amounts to that; and I doubt also whether it can be termed a *transaction*. I think the case of a mere *payment* is left, as before, under the eighty-first section of the 6 Geo. 4, and that the only payments that are protected thereby are payments *to creditors*, not being made by way of fraudulent preference. But if it be a dealing or transaction, then I think it was not *bonâ fide* made and entered into, within the meaning of the statute. The mere *receipt* of the money *bonâ fide* is not sufficient; the party receiving is merely passive, and all that is actively done by the bankrupt is done *malâ fide*. I am by no means satisfied that the defendant was not a creditor within the meaning of the former act; but if not, he is not protected by this statute.

GURNEY, B., concurred.

ROLFE, B.—I am of the same opinion. There can be no doubt that in fact the object of this payment was to prejudice the general creditors of the firm. But it is said, still it is not a fraudulent preference. I do not, however, accede to the supposed distinction which has been made, that this is not money paid by the debtor out of his own assets, but out of assets in which he was jointly interested as a co-partner. I see no difference in principle between the cases. I will only, however, say, that I do not accede to the argument which has been urged on this part of the case, the other ground of decision being so clear that it enables us to come to a perfectly satisfactory conclusion.

Judgment for the plaintiffs.

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June 8.

WOOD v. FENWICK and Others.

THIS was an action of trespass, to which the defendants pleaded not guilty by statute. It was tried at the North-umberland Spring Assizes, 1841, before *Maule*, J., when a verdict was taken for the plaintiff, subject to the opinion of this Court upon the following case.

The plaintiff, at the time of the trial, was eighteen years of age. On the 21st of March, 1840, he entered into a contract to serve Messrs. Lamb and others from the 5th day of April, 1840, to the 5th day of April, 1841, of which contract (usually called in the said county a pit-bond) the following is a copy:—

“Memorandum of agreement made the 21st day of March, A.D. 1840, between Humble Lamb [and others], owners of West Cramlington Colliery, of the one part, and the several other persons whose names or marks are hereunto subscribed, of the other part. The said owners do hereby retain and hire the said several other parties hereto from the 5th day of April next ensuing until the 5th day of April, 1841, to hew, work, fill, drive, and put coals, and to do such other work as may be necessary for carrying on the said colliery, as they shall be required or directed to do by the said owners, their executors, administrators, or assigns, or their viewer or agent, at the respective rates and prices, and on the terms, conditions, and stipulations, and subject to and under the penalties and forfeitures hereinafter specified and declared, that is to say. [The agreement proceeded to state a number of stipulations and minute regulations, as to the rates of wages to be paid by the owners, the quantity and nature of the work to be done, &c. &c., among which were the following:] “6. The

Upon a complaint against a servant for absentsing himself from his service, made under the 4 Geo. 4, c. 34, s. 3, the conviction adjudged that he should be imprisoned in the House of Correction, there to remain and be held to hard labour for one month. The commitment required the keeper to receive him into custody, there to remain and be corrected, and held to hard labour for one month (following the words of the 20 Geo. 2, c. 19, s. 2):—*Held*, that the “correction” therein mentioned must be understood to mean something beyond the hard labour, and therefore that the commitment was bad, as varying in this respect from the conviction, and authorizing a punishment not warranted by the statute.

Semble, a contract of hiring

and service, for wages, is a contract beneficial to and binding upon an infant, though it contain clauses for referring disputes to arbitration, and for the imposition of forfeitures in case of neglect of duty, to be deducted from the wages.

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said hewers hereby hired shall, when required (except when prevented by sickness or other unavoidable cause), do and perform a full day's work on each and every working day, or such quantity of work as shall be deemed equal to a day's work, and shall not leave their work until such day's work or quantity of work is fully performed or finished to the extent of each man's ability; and in default thereof each of the said parties hereby hired and so making default shall for every such default forfeit and pay to the said owners, their executors, &c., the sum of 2s. 6d."—12. "In the event of any of the said hereby hired parties wilfully or negligently disobeying the orders of the said owners, or their agents, or committing a breach of any of the articles of this agreement, then and in every such case the said owners are hereby authorized to stop and retain, out of the wages next becoming due to each and every such person so offending, a sum not exceeding 2s. 6d. for every such offence, or to punish them for such misbehaviour by due course of law." [At the end of the agreement was a clause for referring disputes between the contracting parties to the arbitration of two viewers of collieries, with power in case of their disagreement to appoint an umpire, and subject to the following proviso:—"Provided always, and it is hereby declared, that nothing herein contained shall extend or be construed to extend to alter, prejudice, lessen, or otherwise affect the legal remedies and powers which by law belong to masters and servants in their respective relations to each other, or to magistrates having jurisdiction in case of dispute or difference between them."

The plaintiff entered upon his work and service under this agreement, but on the 4th day of August, 1840, being desirous of putting an end to his contract, he gave notice to the said owners of West Cramlington Colliery, with whom he had entered into the said contract as before stated, that he put an end to the said contract, and intended to leave his said work and service, at the end of

that week. On the Friday night following, the 7th of August, the plaintiff again gave notice to the colliery owners that he did not intend after the next day to return to his work under the said contracts, and said that he would not work any longer under the said bond—that he had cancelled the bond. On the following Monday, accordingly, he absented himself. On the afternoon of the same day he was apprehended by a policeman, and on the next day taken before the defendants, who are three of her Majesty's justices of the peace for the county of Northumberland, on a charge of leaving his employment, grounded upon the stat. 4 Geo. 4, c. 34, s. 3. Upon the hearing of the said complaint and charge, it was proved before the defendants, that at the time of entering into the said contract, and also at the time of the said hearing, the plaintiff was an infant under the age of twenty-one, and also that he had, as before stated, given notice on the said 4th and 7th of August to the owners of the colliery that he the plaintiff put an end to the contract, and did not intend to return to his said employment and work under the same after the close of that current week, and that he had absented himself from his said employment in pursuance of the said notice. It was then insisted before the defendants, by an attorney who appeared on behalf of the plaintiff, that he the plaintiff, being an infant, had a right to put an end to the contract, and that it had been in point of law determined by the said notice, and that the defendants had no jurisdiction in that case under the statute. The defendants, however, by a conviction in writing, bearing date the 11th August, 1840, under their hands and seals, as such justices as aforesaid, convicted the plaintiff; of which conviction the following is a copy. [The case then set forth the conviction, which, after reciting the complaint of Thos. Taylor the younger, agent to Humble Lamb and others his partners, that the plaintiff, being an artificer, to wit, a pitman, contracted with them to serve them as a pitman in the said colliery, and entered

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into the service according to the contract, and afterwards, and whilst he was in the said service, and during the continuance of the said contract, to wit, on the 10th August, 1840, "was guilty of misconduct and misdemeanor respecting the said contract, that is to say, the plaintiff did then and there unlawfully absent himself from his said service before the term of his said contract was completed, contrary to the form of the statute in such case made and provided;" and after setting forth the hearing and evidence, adjudged that the plaintiff should "for his said offence be imprisoned in the House of Correction for the county aforesaid at Tynemouth in the county aforesaid, there to remain and be held to hard labour for the space of one month."

Upon and by virtue of this conviction, the defendants, under their hands and seals, issued a certain warrant of commitment against the plaintiff, of which the following is a copy:—

"Northumberland (to wit). To the constable of the township of Tynemouth, in the said county of Northumberland, and to the keeper of the House of Correction at Tynemouth, in the said county. Whereas information and complaint hath been made unto John Fenwick, Henry Mitcalfe, and Jos. Harrison Fryer, Esq., three of her Majesty's justices of the peace in and for the said county, upon the oath of Thomas Taylor the younger, agent for Humble Lamb and others his partners, owners or lessees of West Cramlington Colliery, in the county aforesaid, that Thomas Wood, late of West Cramlington aforesaid, bound by agreement in writing to the said Humble Lamb and his said partners for the term of one year, to serve as a pitman, hath in his said service been guilty of divers misdemeanors, miscarriages, and ill behaviour towards the said Humble Lamb and his partners, particularly on the 10th day of August now instant, he the said Thomas Wood absented himself from his said service, not being yet expired or otherwise determined: And whereas, in pursuance of

the statute in that case made and provided, we have duly examined the proofs and allegations of both the said parties touching the matter of the said complaint, and upon due consideration had thereof, we have adjudged that the said Thomas Wood hath in his said service aforesaid been guilty of divers misdemeanors, miscarriages, and ill behaviour towards the said Humble Lamb and his said partners, and particularly on the 10th day of August now instant, he the said Thomas Wood absented himself from his said service without leave or any just cause, and still doth absent himself, the term of the said service not being yet expired or otherwise determined: We do therefore convict him of the said offence, in pursuance of the statute made and provided. These are therefore to command you the said constable forthwith to convey the said Thomas Wood to the said House of Correction at Tynemouth aforesaid, and to deliver him to the keeper thereof, together with this warrant; and we do hereby command you the said keeper to receive the said Thomas Wood into your custody in the said House of Correction, there to remain and be corrected and held to hard labour for the space of one calendar month from the date hereof, and for so doing this shall be your sufficient warrant. Given under our hands and seals the 11th day of August, A. D. 1840.

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"JOHN FENWICK, (L. S.)

"HENRY MITCALFE, (L. S.)

"J. H. FRYER, (L. S.)"

Under and by virtue of this commitment, the plaintiff was taken to the keeper of the House of Correction at Tynemouth, in the said county, and was there kept in close custody and at hard labour for the space of one month.

At the trial, the plaintiff having proved the foregoing facts, as to the notices given to the colliery owners, and what took place before the defendants at the hearing, and having put in the warrant of commitment, and proved the

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plaintiff's imprisonment under it, and having proved that proper notice of action had been duly given, the defendants gave in evidence the said conviction. The learned Judge expressed his opinion, that supposing the point to be necessary for the decision of the case, whether the contract was or was not beneficial for the infant, it was a question for the Court and not for the jury; but in order to prevent the necessity of the case going down again to trial, he, with the consent of counsel, took the opinion of the jury whether the said contract was a beneficial one to the plaintiff, and the jury found that it was a beneficial contract. He also took their opinion what damages the plaintiff ought to recover, if this Court should think that he was under the above circumstances entitled to a verdict; and the jury found that he ought to recover the sum of £5.

The question for the opinion of the Court is, whether under the above circumstances the plaintiff is entitled to a verdict. If the Court should be of opinion that he is, then a verdict to be entered for the plaintiff, with £5 damages; if the Court should be of opinion that he is not, then a verdict to be entered for the defendants.

The plaintiff's points for argument were as follows:—

It is proposed on the part of the plaintiff to argue, that being an infant under the age of twenty-one years at the time the supposed offence for which he was imprisoned was committed, he was entitled by law to avoid or put an end to his contract with the colliery owners; that he did avoid or put an end to it by notice; that, consequently, at the time of the supposed offence there was no contract existing between himself and the colliery owners, and that therefore the defendants had no authority as justices to imprison him.

It is also proposed to contend that the contract with the colliery owners, for a breach of which he was imprisoned by the defendants, contains provisions to which as an

infant he had no power by law to bind himself, and therefore the contract was not only voidable but ipso facto void.

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It is also proposed to take the following objections to the warrant of commitment, under the authority of which the plaintiff suffered the imprisonment for which the action was brought, namely—

1st. That the commitment states that the said Thomas Wood had been guilty of divers misdemeanors, miscarriages, and ill behaviour, without describing them.

2ndly. That it does not sufficiently appear by the commitment in respect of what offence the punishment is inflicted.

3rdly. That for anything that appears on the commitment, Thomas Wood was punished for several distinct offences.

4thly. That if Thomas Wood was punished for absenting himself as described in the commitment, the punishment mentioned in the commitment was not warranted by law.

5thly. That the punishment in the commitment is different from that adjudged and awarded in the conviction.

6thly. That the commitment states the conviction to be on the information of Thomas Taylor, agent for Humble Lamb and others his partners, without stating the names of the partners.

7thly. That the offences which are charged are stated to be against Humble Lamb and others his partners, without stating the names of the partners.

The defendants' points were—

That the contract of service set forth in the case was beneficial to the plaintiff, and binding upon him notwithstanding his infancy.

That, even if not so binding as to be enforced against him by action, it placed him in the relation of servant to

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the coal owners, and subjected him to the summary jurisdiction of the magistrates.

That if the contract were voidable, it could only be avoided by the plaintiff in case it became injurious to him, and upon notice of the grounds of the avoidance.

Granger, for the plaintiff.—First, this commitment is clearly bad on several grounds. One clear objection to it is, that there is a difference between the conviction and the commitment, as to the punishment: by the former, the plaintiff is to be imprisoned and kept to *hard labour*; by the latter, he is to be imprisoned and *corrected*. Now *correction* is to be understood of a correction by *whipping*: *R. v. Hoseason* (a). The complaint in the present case was made under the stat. 4 Geo. 4, c. 34, s. 3, which empowers the justices to commit the offender to the House of Correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months; whilst the 20 Geo. 2, c. 19, s. 2, upon which the commitment is framed, empowers them to punish the offender by commitment to the House of Correction, there to remain and be corrected, and held to hard labour, for a reasonable time, not exceeding one calendar month. The punishments inflicted by the two acts cannot be blended together: *R. v. Hoseason*. The commitment and conviction must connect themselves together in all material respects, in order that the former may be a justification for the imprisonment: *Rogers v. Jones* (b), *Daniel v. Phillips* (c).

Secondly, the punishment mentioned in the commitment was not warranted by law. Here the complaint was made by an agent of the employers. That could only be done under the 4 Geo. 4, c. 34: under the 20 Geo. 2, c. 19, the employer himself must make oath of the default. But the

(a) 14 East, 696.

(b) 3 B. & Cr. 409; 5 D. & R. 268.

(c) 1 C. M. & R. 602; 5 Tyr. 293.

punishment mentioned in this commitment is not warranted by the former statute, but is such as could be inflicted only in case of a complaint by the master himself.

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Thirdly, the commitment ought to have set forth the names of all the parties on whose behalf the complaint was made, and it was not sufficient to designate them as "Humble Lamb and others his partners." It must have been supposed that the stat. 7 Geo. 4, c. 64, s. 14, applied; but that is confined to indictments and informations for offences against property. On this ground both the conviction and commitment are bad.

Fourthly, it appears that the complaint was made, and the defendants adjudged, that the plaintiff was guilty of "divers misdemeanors, miscarriages, and ill behaviour." That is too general in its terms. And although the commitment goes on to point out one instance of misconduct, viz. the absenting himself from his service, it does not appear on the face of it, that the punishment was awarded in respect of that.

But, in the next place, this contract was either, from its nature, absolutely void, the plaintiff being an infant, or at least was voidable by him. The dictum of *Bayley, J.*, in *R. v. Inhabitants of Chillesford* (a), will be cited for the defendants, where he says, "An infant may make a contract for his own benefit; he may therefore make a contract for hiring and service, for that will be beneficial to him. It will give him a right to sue for wages. If he does not perform his contract, although no action may lie against him, he will be liable to the statutable regulations applicable to masters and servants." But in the same case *Abbott, C. J.*, says, "The contract by an infant, made for his own benefit, according to general principles of law, is not void, but voidable only at the election of the infant." Neither does the former learned Judge in terms say that

(a) 4 B. & Cr. 24; 6 D. & R. 161.

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it is not voidable, but only that whilst it continues, the infant is subject to the statutable regulations. The contract cannot indeed be avoided by the mere act of the infant's absenting himself from the service: *Gray v. Cookson* (a); but here he gave regular notice of his intention, which is sufficient, according to the case of *Rex v. Evered*, there cited. But further, this was not at all a beneficial contract to the infant. It contains a clause for submitting disputes to arbitration: now a submission by an infant to arbitration is void, or at least voidable. Then there are clauses imposing penalties and forfeitures, and they may even amount to more than his wages. It is not sufficient that the contract *may* be beneficial; the Court must see that it must necessarily be so. [*Alderson, B.*—The Court must see that on the whole he derives a benefit under the contract. Here he is hired and receives wages. It is clear he derives a benefit; he may also be subject to some inconveniences, but that is not necessarily so. *Lord Abinger, C. B.*—There can be no doubt that, generally speaking, a contract by an infant to receive wages for his labour is binding upon him.] At all events, he may determine it at any time by notice. [*Lord Abinger, C. B.*—That would be a contradiction in terms: because, to say that he may contract, is to say that he may bind himself by the contract; how then can it be determined at his election the next day?]

Ingham, contra.—Every contract for the benefit of an infant at the time is binding, and this is a contract of that nature: *Com. Dig. Infant, (B. 5)*; *Maddox v. White* (b). All the cases of settlement by apprenticeship proceed on the ground that the contract is for his benefit: see *R. v. Inhabitants of Mountsorrel* (c), and *R. v. Inhabitants of Great Wigston* (d). To say that he may avoid the contract

(a) 16 East, 13.

(b) 2 T. R. 169.

(c) 3 M. & Sel. 497.

(d) 3 B. & Cr. 484; 5 D. & R. 339.

the next day, is plainly a contradiction in terms; for he contracts to perform it for the stipulated period. If it have become injurious to him, that may be shewn before the justices. Here the infant obtains maintenance, and instruction in that mode of employment in which he is hereafter to get his livelihood. And the jury have found the contract to be beneficial; and they are in truth the proper judges of this, because whether it be so or not depends on a number of surrounding circumstances, on which they only can decide. The question what are *necessaries* for an infant is held not to be altogether matter of law: *Maddox v. Miller* (a). The penalties imposed by this contract are to be *deducted from* the wages; and if the wages are improperly withheld, the party may complain to the magistrates, whose jurisdiction is expressly preserved by the contract. But even if this contract was voidable, the plaintiff did not give a sufficient notice to avoid it: *R. v. Evered, Gray v. Cookson*. He simply said he did not intend to serve any longer, not that he determined the contract on the ground that he was an infant when bound.

Next, the commitment is not invalid. The first two objections taken to it resolve themselves into one, which depends on the necessary meaning of the word "corrected." That does not necessarily mean by *whipping*. In *R. v. Hoseason*, it was found that the adjudication was under the stat. 20 Geo. 2, c. 19, under which no other sense could be given to it; but here the proceeding was under the 4 Geo. 4, c. 34. It may mean that he is to be corrected *by* being held to hard labour. [*Gurney, B.*—No; he is to be corrected in addition to being held to hard labour. Lord *Abinger, C. B.*—It cannot be said it is mere surplusage; it means something beyond hard labour. Is the gaoler himself to put a construction upon it, and correct him as he pleases?

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(a) 1 M. & Sel. 738.

Exch. of Pleas, Rolfe, B.—Suppose the gaoler had whipped him, he would have had authority for it in the commitment.]

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LORD ABINGER, C. B.—It is clear the being “corrected” means something beyond the hard labour, whether by whipping or otherwise, and so is out of the statute. It is unnecessary, therefore, to determine the other point which has been raised. There must be judgment for the plaintiff.

GURNEY, B.—I have considerable doubt also about the validity of the conviction.

ROLFE, B., concurred.

Judgment for the plaintiff.

June 8.

PICKWOOD *v.* NEATE.

Declaration in case stated, that the defendant was the agent of the

CASE.—The declaration stated, that before and at the time of the making of the bill of exchange thereafter plaintiff and P. for managing a plantation in the island of St. Christopher; that the plaintiff resided in England; that the plaintiff and P. were beneficially interested in the above estate in undivided moieties, and that the defendant was authorized by the plaintiff and P. to draw bills in their joint names, for the payment of monies owing by them in respect of supplies and necessities for the estate, and the necessary expenses incurred in its management; that certain demands had been made, by persons in the island, upon P., for the payment of debts due from her, P., for necessities supplied for the benefit of the estate, before the defendant's appointment as agent, and for which, as the defendant knew, the plaintiff was not liable. Breach, that the defendant, in violation of his duty, and without the knowledge or consent of the plaintiff, and for the purpose only of providing funds to satisfy the debts so owing by P., drew a bill in the joint names of the plaintiff and P., which was refused acceptance, and on which the plaintiff and P. were sued to judgment by the holder in the Court of Queen's Bench in St. Christopher, and to satisfy which judgment their estate was sold.

Plea, that the said necessities, in respect of which the said bill was drawn, were provided for the benefit as well of the rights and interests of the plaintiff as of P. in the said estate, while they were jointly interested therein as in the declaration mentioned, and for their joint benefit, and that as well the rights and interests of the plaintiff as of P. in the estate were, according to the laws of the island, liable to the payment of that debt; and that the defendant, by the authority and with the leave and license of the plaintiff and P., drew the said bill.

Held, on special demurrer, that the plea was bad for duplicity:—*Held*, also, that the first part of the plea amounted to not guilty, inasmuch as in effect it denied the wrongful act alleged in the declaration, viz. the drawing of the bill for a purpose for which the defendant had no right under his authority to draw it.

mentioned, the defendant, at his request, had been appointed by the plaintiff, and then was the agent and attorney of the plaintiff and one Harriet Pogson, for managing, cultivating, and conducting, for and on behalf of the plaintiff and the said Harriet Pogson, a certain plantation, land, and premises called the Godwin estate, situate in the island of St. Christopher, in the West Indies; and the defendant, before and at the time of the committing of the grievances thereafter mentioned, resided in the said island, and acted as the agent and attorney of and for the plaintiff and the said Harriet Pogson, in the management, cultivation, and conduct of the said estate: and whereas, before and at the time of the said appointment of the defendant as such agent and attorney as aforesaid, and from thence continually until and at the time of the committing of the grievances and the happening of the damage thereafter mentioned, the plaintiff resided in England, and the plaintiff and the said Harriet Pogson were, during all the time last aforesaid, beneficially entitled to or otherwise interested in the said Godwin estate in certain shares and proportions, to wit, in undivided moieties; and the defendant had been and was authorized and empowered by the plaintiff and the said Harriet Pogson to make and draw, and was, as such agent and attorney as aforesaid, in the habit of making and drawing, bills of exchange in the joint names of the plaintiff and the said Harriet Pogson, for the payment of monies due and owing from them in respect of supplies and necessaries found and provided for the use of the said estate, and in respect of the necessary charges and expenses incurred in the management and cultivation and conduct thereof; of all which premises the defendant, at the time of the committing of the grievances, &c., had full knowledge and notice: and whereas also, whilst the defendant was such agent or attorney as aforesaid, and so authorized as aforesaid, and before &c., divers claims and demands, amounting in the whole to a large

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sum of money, to wit, 262*l.* 2*s.*, had been and were made by divers persons in the said island on the said Harriet Pogson, for the payment of certain debts and sums which were then alleged and claimed to be due and owing from the said Harriet Pogson to such persons respectively, for and in respect of necessaries and other things which had been found and provided for the benefit of the said estate, and otherwise in relation thereto, long before the said appointment of the defendant as such attorney and agent, and long before he acted as or was the attorney or agent of the plaintiff and the said Harriet Pogson, and no part of which said necessaries or other things had been, as the defendant well knew, found or provided upon the credit or for or on account of the plaintiff, either alone or jointly with the said Harriet Pogson or any other person, nor was the plaintiff, as the defendant also well knew, at any time liable, either alone or jointly &c., to pay to any of the said last-mentioned persons any part of the said debts or sums of money; nor was any claim or demand at any time made upon the plaintiff, or upon the defendant as her agent, by any person or persons for any of the said debts or sums of money or any part thereof: yet the defendant, well knowing the premises, but contriving &c., heretofore, and whilst he was such agent, and so authorized and empowered as aforesaid, but not further or otherwise, to wit, on the 18th July, 1840, wrongfully, fraudulently, and improperly, and in breach and violation of his duty as such agent, and without the knowledge or consent of the plaintiff, and without her will, and for the purpose only of procuring funds to satisfy and discharge the said debts or sums of money so claimed to be due from the said Harriet Pogson, and not for any purpose for which he was authorized to make or draw bills of exchange in the name or as the agent of the plaintiff and the said Harriet Pogson, or of the plaintiff alone, made and drew, in the joint names of the plaintiff and the said Harriet Pogson, and delivered to James

Berridge after mentioned, a certain bill of exchange in writing, addressed to Archibald Paull & Son, for the payment of 262*l.* 2*s.*, to the order of James Berridge, Esq., at a certain time in the said bill mentioned, and long since past, to wit, at ninety days' sight.—The declaration then averred, that the drawees refused acceptance and payment of the bill; and that an action was brought upon it against the plaintiff and Harriet Pogson as the drawers, in the Court of Queen's Bench and Common Pleas, in St. Christopher, and such proceedings were thereupon had, that judgment was recovered against them in the said action for 1614 dollars, amounting to 843*l.* 10*s.* 8*d.* sterling, for damages and costs, under which the interest of the plaintiff in the Godwin estate was sold and disposed of, &c. &c.

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The defendant pleaded (*inter alia*), that the said necessities and other things, in respect of which the sum of 262*l.* 2*s.* was claimed and demanded as in the declaration mentioned, were found and provided in the said island of St. Christopher, for the benefit as well of the rights and interests of the plaintiff, as of the rights and interests of the said Harriet Pogson, of and in the said estate and in relation thereto, while the plaintiff and the said Harriet Pogson were entitled to and interested in the said estate as in the declaration mentioned, and were so found and provided on account and for the benefit of the plaintiff and the said Harriet Pogson jointly; and that as well the rights and interests of the plaintiff as of the said Harriet Pogson to and in the said estate were, according to the laws in force in the said island of St. Christopher, subject and liable to the said sum of 262*l.* 2*s.*, and to the payment thereof: and the defendant further says, that he the defendant, by the authority and with the leave and license of the plaintiff and the said Harriet Pogson to him first given, made and drew the said bill of exchange, and com-

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mitted the pretended grievances in the declaration mentioned, in manner and form, &c.—Verification.

Special demurrer, assigning for causes, that the plea does not confess and avoid the matters alleged in the declaration, nor directly and in a proper manner traverse the same: that it amounts to the general issue, and should have concluded to the country, &c. &c. And that the plea, besides containing a denial of the allegations in the declaration, which would be sufficient to decide the action, contains also a further distinct answer to the declaration, namely, that the defendant drew the bill of exchange by the authority, leave, and license of the plaintiff and Harriet Pogson, and is in that and other respects double and multifarious, &c.—Joinder in demurrer.

The defendant's points for argument were, that the declaration shews no ground of action, as the unauthorized drawing by the defendant of a bill of exchange, in the name of the plaintiff, could not bind the plaintiff, or produce any damage to her or her estate. That leave and license of the plaintiff was necessary to be specially pleaded; the declaration setting up and being founded on a limited authority to the defendant, which he exceeded. That the plea is a plea of leave and license.

W. H. Watson, in support of the demurrer.—The first objection is, that this plea amounts to the general issue. In effect it sets up the defence, that the defendant committed no wrong, because he drew the bill for a purpose for which he had a right under his authority to draw it. In truth it amounts to two general issues.—The Court called upon

Tyrwhitt, *contra*.—The declaration is bad in substance, and discloses no sufficient cause of action. The question is, whether there was not a defence to the action on the bill

in the colonial Court. If it was not drawn with authority, it was not the bill of the plaintiff, on which she could be made chargeable. This was not an action against the acceptor, who, by the act of acceptance, legalizes the drawing, but against the alleged drawers themselves. [*Alderson, B.*—The case is not one of an entire want of authority, but of a limited authority, exceeded in the particular case. The bill would notwithstanding be good in the hands of a bonâ fide holder, although, as between the parties themselves, it was a breach of the defendant's duty.] The action is founded only on the special damage sustained by the drawing without authority. For aught that appears, no damage may have been sustained thereby; no defence whatever may have been made to the action on the bill, and the plaintiff in that action not put to prove that he was a bonâ fide holder. In *Short v. Kalloway (a)*, Lord Denman says,—“No person has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action which he cannot defend.” So also, a party cannot inflame his demand against another, by a neglect to defend an action to which there was a defence. [*Alderson, B.*—It is an injury to a person to expose him to an action at all.] Then as to the plea. The plea of not guilty would only have denied the act charged in the declaration as wrongful. [*Alderson, B.*—Or the breach of duty; and the breach of duty charged here is the drawing against authority.] The plea of not guilty admits the facts stated by way of inducement in the declaration: *Frankum v. Earl of Falmouth (b)*; *Lewis v. Alcock (c)*. And in *Taverner v. Little (d)*, Tindal, C.J., says,—“The inducement of the declaration is that part which precedes the charge, which contains a statement of facts out of which the charge arises, or which are neces-

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(a) 11 Ad. & E. 31.

(c) 3 M. & W. 190.

(b) 2 Ad. & E. 452; 4 Nev. & M. 330.

(d) 5 Bing. N. C. 685; 7 Scott, 796.

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sary or useful to make the charge intelligible." So, in *Wright v. Lainson* (a), Lord Abinger, C. B., says, that "the inducement is that statement of preliminary facts which is necessary to make it understood what is the charge against the defendant." The authority of *Taverner v. Little* was recognized in *Hart v. Crowley* (b). Here the material part of the inducement is the authority which the defendant had to draw bills *in some way*: then the defendant has to shew by his plea that he had a *further* authority, beyond the limited one set forth in the declaration. The act of drawing a bill was not in itself necessarily wrongful; and all that "not guilty" would put in issue would be the *wrongful* act of drawing. [Alderson, B.—No doubt the defendant could have denied the limited authority by traversing it.] As to the supposed second general issue, that is merely immaterial, and does not injure the main part of the plea, which is, that the bill was drawn by the leave and license of the plaintiff. [Alderson, B.—The first part of the plea would be a good defence. Lord Abinger, C. B.—The plea sets up two defences—one by denying the statement in the declaration as to the goods provided by the defendant; the other by an allegation of leave and license. The plea of not guilty alone would be sufficient, unless you can shew a specific authority to draw this bill.]

Tyrwhitt then prayed and obtained leave to amend, by striking out the first part of the plea and leaving only the allegation of leave and license,—otherwise

Judgment for the plaintiff.

(a) 2 M. & W. 744.

(b) 12 Ad. & E. 378.

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June 10.

PETERS v. SHEEHAN.

IN this case *Keating* had obtained a rule, on behalf of the assignees of the plaintiff, who had become bankrupt, calling on the plaintiff's attorney to shew cause why he should not pay the costs of taxation of his bill, more than a sixth having been disallowed by the Master. The attorney had delivered the bill unsigned; and the assignees had obtained an order "that the bill of costs delivered in this cause, and all other matters in which he (the attorney) was concerned for the plaintiff, be referred to the Master to be taxed, credit being given for all sums received on account." No action had been brought on the bill. The judge's order was made "by consent," and the attorney attended the taxation.

Where an attorney has agreed to, or acted upon, an order for the taxation of his unsigned bill, the Court has authority to order him to pay the costs of the taxation, if more than one-sixth be taxed off.

Macaulay now shewed cause.—This was not the case of a reference to the Master under the stat. 2 Geo. 2, c. 23, s. 23, and therefore the Court has no authority to grant the present application. The statute applies only to cases where a *signed* bill has been delivered a month before action brought. This was a mere reference to the Master to ascertain the amount due, no undertaking being given to pay that amount, as would have been the case had it been a reference under the statute. [*Alderson*, B. —Can it be doubted that the Court has a general power to visit the attorney with the costs of taxation, where more than one-sixth of his bill has been taken off?] *Howard v. Groom* (a) appears to be an authority to the contrary. There, in an order referring an attorney's bill to taxation, the usual undertaking of the client to pay what should be found due was omitted, and the Court refused to refer it to the Master to tax the costs of the taxation against the attorney, more than a sixth having been taken off the bill,

(a) 4 Dowl. P. C. 21.

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although the attorney had submitted to the taxation, and a balance had been found due from him to the client. [Alderson, B.—Every person who comes before the Court subjects himself to its jurisdiction as to costs. Suppose there be an order to deliver up a deed, is there not, incidental to that, a power to order the taxation of the costs? It is a part of the general jurisdiction of the Court.] In that case *Coleridge, J.*, says,—“ I apprehend the power of the Court to tax the defendant his costs of taxation, is only given by the statute. If you look at the words of the 2 Geo. 2, c. 23, s. 23, you will see the conditions introduced on which such a taxation is to take place, and without a compliance with which the Court cannot direct them to be taxed. The attorney is obliged to deliver his bill, and on that delivery the client has an option to go before the Master and have it taxed; but then that is allowed only upon the performance of certain conditions. One is, that he shall undertake to pay what shall appear to be due on taxation.” [Alderson, B.—*Howard v. Groom* must be considered as being overruled, since the case of *Williams v. Griffith (a)*. If the Court have no authority, except under the 2 Geo. 2, they would have no authority where an action has been brought upon the bill. Lord Abinger, C. B.—If the attorney thinks fit to go before the Judge, and makes no objection to the order, does it follow that the Court has no jurisdiction to visit him with the costs of the taxation, because he has consented to an order containing the usual undertaking?] In *Gerrard v. Arnold (b)*, where the parties had agreed to waive the delivery of a signed bill, Parke, B., said,—“ The question is, whether, by waiving the delivery of a signed bill, you do not waive the operation of the statute, so far as it gives an authority to order the attorney to pay the costs. If they intended to waive the statute *primâ facie*, they waived all the consequences.” [Alderson, B.—There the application was to the discretion

(a) 6 M. & W. 32.

(b) 6 Dowl. P. C. 336.

of the Court; here you deny its jurisdiction altogether. There is no doubt a distinction between the authority of the Court under the statute, and its authority independently of the statute: under the statute, it is required that the Court *shall* award the costs of taxation against the attorney, if more than one-sixth be taken off; but if, in a case not within the statute, an attorney submits to an order for the taxation of his bill, and it is made unconditionally, and acted upon accordingly, he is within the general jurisdiction which the Court has of inflicting costs on any person who has been guilty of imposition. The power of the Court arises from the circumstance of the party submitting himself to and acting under its jurisdiction. In every case in which the Court makes an order upon a party within its jurisdiction, it is not merely that some act shall be done, but that it shall be done at the costs of one or the other of the parties.] It is clear that this is not an order which could be enforced by attachment: *Ryalls v. Emerson* (a), *Ex parte Ward* (b).

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Keating, in support of the rule, was stopped by the Court.

LORD ABINGER, C. B.—The short answer to the objection in this case is, that this is not an application under the statute, but under the general jurisdiction of the Court.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Macaulay then objected that the Master had improperly disallowed an item in the bill, whereby the deductions had amounted to one-sixth, and thereupon the Court referred the matter back to him.

Rule accordingly.

(a) 2 C. & M. 464.

(b) 1 Har. & Woll. 212.

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1842.

June 10.

Covenant on an annuity deed alleged to have been made between the defendant of the one part and the plaintiff of the other part. Plea, that the annuity in the said indenture mentioned was granted for a pecuniary consideration, paid by the plaintiff to one Ann King, and that no memorial thereof was inrolled in the High Court of Chancery, &c. pursuant to the statute. The replication to this plea set forth a memorial of the deed inrolled in the manner directed by the act (53 Geo. 3, c. 141, s. 2), but which stated the parties to the deed as being the defendant and Ann his wife, (formerly Ann Gadd, spinster), of the one part, and the plaintiff of the other part. To this replication there was a special demurrer, on the ground that the memorial set out in the replication, differing in the names of the parties from the deed as set out in the declaration, did not shew a compliance with the statute in respect of the instrument declared on.—Joinder in demurrer.

COVENANT on an annuity deed, alleged to have been made between the defendant of the one part, and the plaintiff of the other part. Plea, that the annuity in the said indenture mentioned was granted for a pecuniary consideration, paid by the plaintiff to one Ann King, and that no memorial thereof was inrolled in the High Court of Chancery, &c. pursuant to the statute. The replication to this plea set forth a memorial of the deed inrolled in the manner directed by the act (53 Geo. 3, c. 141, s. 2), but which stated the parties to the deed as being the defendant and Ann his wife, (formerly Ann Gadd, spinster), of the one part, and the plaintiff of the other part. To this replication there was a special demurrer, on the ground that the memorial set out in the replication, differing in the names of the parties from the deed as set out in the declaration, did not shew a compliance with the statute in respect of the instrument declared on.—Joinder in demurrer.

Willes, in support of the demurrer.—The deed stated in the declaration is alleged to have been made between the defendant and the plaintiff, whereas that set forth in the memorial is between the defendant *and his wife* of the one part, and the plaintiff of the other part; there is therefore no sufficient memorial shewn of the deed declared on, and the replication is a departure. The question on these pleadings is not whether there was a memorial *in fact*, but whether there was a valid memorial, according to the requisitions of the statute, of the deed mentioned in the declaration: *Hickes v. Cracknell (a)*. Again, the declaration ought to have stated the deed as

being made between the defendant and Ann King of the one part, and the plaintiff of the other part. The wife was a material party, as an interest might pass from her. It is possible there might be two different deeds, and, upon an issue of nul tiel record, the Court could not say of which deed this was a memorial.

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Ogle, contra, was stopped by the Court.

LORD ABINGER, C. B.—I think the memorial is sufficient. If there be another deed, that is a matter of fact to be tried by the jury.

ALDERSON, B.—I think the replication is good. [His Lordship stated the pleadings, and proceeded:] It is said that the deed, as inrolled, is contrary to the deed declared on: but there is nothing inconsistent between them; the wife may be a party to the deed only for the purpose of more fully securing the annuity granted by the defendant.

GURNEY, B., and ROLFE, B., concurred (a).

(a) A rule had been obtained in Easter Term, for setting aside the demurrer as frivolous, which, after argument, was discharged. See

Arnold v. Revault, 1 Brod. & B. 443, 4 Moore, 66; *Lysaght v. Walker*, 5 Bligh, N. S., 1.

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June 3 & 4.

THE MARQUIS OF ANGLESEY v. LORD HATHERTON and
Another.

TROVER for coals, limestone, and ironstone. Pleas, first, as to the conversion and disposition of the said coals, parcel of the said goods and chattels in the declaration mentioned, that divers, to wit, 50 acres of land, with the appurtenances, situate in the parish of Cannock, in the county of Stafford, before and at the said time when &c. were, and from time immemorial have been, within and parcel of the manor of Cannock and Rugeley, in the said county of Stafford, and a customary tenement thereof, demised and demisable by the lord of the said manor, or his steward of the courts of the said manor, for the time being, to any person or persons willing to take the same

On a question as to the existence of a custom in a particular manor, evidence of a like custom in an adjoining manor, though within the same parish and leet, is not admissible.

Not even though there be evidence to shew that the latter manor was a subinfeudation of the former; at

least, unless it be clearly shewn that they were separated after the time of legal memory, since otherwise they may have had different immemorial customs.

Evidence of payment of an annual sum of 4s. by the lord of the manor of W. to the lord of the manor of C. "for the manor of W.," was held not to be sufficient evidence that W. was such a subinfeudation of C.

A deed dated in 1605, made between the lord of the manor of C. of the one part, and a number of the copyholders of the manor of the other, reciting that the customs of the manor, of and concerning their copyhold premises, had immemorially been claimed to be as thereafter expressed, proceeded to state in detail various alleged customs, among which no mention was made of any custom for the copyholders to take minerals. The deed then stated, that whereas, at the request of the said copyholders, and in consideration of £1500 paid by them to the lord, he had agreed that the said customs should be allowed, ratified, and confirmed, and that the copyholders were contented to submit to them: therefore the lord did thereby, for him and his heirs, allow all the said customs to be the true customs of the manor, for and touching all the said customary and copyhold lands before mentioned; and the lord then covenanted with the said copyholders that he, his heirs and assigns, should be bound by the said customs for ever, and that the copyholders, their heirs and assigns, should enjoy them for ever without interruption; and the copyholders covenanted with him that they would at all times thereafter submit themselves to and be bound by the said customs. It was then provided, that forasmuch as some matter or point of custom within the manor, not therein mentioned, might come in question, and doubts might be made of the true exposition of some matter or custom therein set forth, it was agreed between the parties that if any such matter, point, or custom, should come in question, it should be settled by a jury to be summoned as therein mentioned. And it was further agreed, that none of the ancient court rolls of the manor should be shewed or taken to prejudice or impugn any of the customs therein specified. This deed was confirmed in terms by a decree in Chancery, which contained a clause providing that it should not, nor should the said customs, extend but to the complainants and defendants (the copyholders who were parties to the deed, and the lord), and to the complainants' copyhold tenements, and should not be prejudicial to the lord concerning any other copyholds in the manor.

Held, that this deed was admissible in evidence, against a copyholder deriving title under one of the parties to it, to negative the existence of a custom of the manor for the copyholders to take the minerals under their respective copyholds.

Semble, that it would have been evidence for the same purpose, even against a copyholder not deriving title under any of the parties to it.

in fee simple, at the will of the lord, according to the custom of the said manor, by and under the rents, customs, and services theretofore due and of right accustomed. And the defendants further say, that within the said manor there is and hath been a certain ancient and laudable custom there used and approved of, that is to say, that every customary tenant of each and every customary tenement within and parcel of the said manor, for the time being, from time whereof the memory of man is not to the contrary, respectively hath and had used and been accustomed to have, and of right ought to have had, and still of right ought to have, for himself or herself respectively, all and every the mines, veins, seams, and beds of coal lying or being or to be found under the soil of each and every of the said customary tenements respectively, together with full and free liberty for each and every of the said customary tenants respectively, and for his or her workmen or servants, to open, search for, dig, get, and win the said mines, veins, seams, and beds of coal, so lying and being or to be found under the soil of each and every of the said customary tenements respectively, and the coals thence arising to take, carry, convey, or otherwise dispose of, at his or her free will. And the defendants further say, that long before the said time when &c., to wit, on the 26th day of October, 1825, the plaintiff, then being lord of the said manor, at his court holden in and for the said manor, before Thomas Hinckley, Esq., then steward of the said court, granted to the defendant Edward John Lord Hatherton (by his then name and style of Edward John Littleton, Esq.), and to John Walhouse, Esq., since deceased (amongst other things), the said customary tenement in this plea first mentioned, with the appurtenances, to hold the same to the said Edward John Lord Hatherton and the said John Walhouse, and the survivor of them, and their heirs for ever, at the will of the lord of the said manor, according to the custom of the said manor, by and

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under the rents, customs, and services therefore due and of right accustomed; by virtue of which said grant the defendant Edward John Lord Hatherton, afterwards, and before the said time when &c., to wit, on the day and year last aforesaid, entered into the said last-mentioned customary tenement, with the appurtenances, and became and was thence continually until and at the said time when &c., seised thereof in manner aforesaid, and entitled to the said mines, veins, seams, and beds of coal lying and being or to be found under the soil of the said last-mentioned customary tenement; wherefore the said defendant Edward John Lord Hatherton, whilst he was so seised and entitled as aforesaid, and after the death of the said John Walhouse, and before the said time when &c., to wit, on the 1st day of January, 1839, opened, searched for, and dug certain mines, veins, seams, and beds of coal then lying and being under the soil of the said last-mentioned customary tenement, and then took, got, won, and carried away therefrom divers, to wit, 1000 tons of coals, which are the same coals as are in the said declaration and in the introductory part of this plea mentioned: and the defendants further say, that afterwards, and before the said time when &c., to wit, on the day and year last aforesaid, the said Edward John Lord Hatherton delivered the said coals to one Richard Roe, to be kept by the said Richard Roe to and for the use of him the said Edward John Lord Hatherton; and the said Richard Roe afterwards, and just before the said time when &c., to wit, on the day and year last aforesaid, in violation of his said trust, delivered the said coals to the plaintiff, who thereby then became and was possessed thereof; whereupon the said Edward John Lord Hatherton in his own right, and the said Henry Brierly as his servant and by his command, at the said time when &c., took the said coals from and out of the possession of the plaintiff, as they lawfully might for the cause aforesaid, which is the same conversion and disposition as

in the introductory part of this plea mentioned. Veri- *Erck. of Pleas,*
fication (a). 1842.

The second and third pleas were precisely similar, except that they were pleaded as to the ironstone and limestone respectively. The fourth, fifth, and sixth pleas were similar to the first, second, and third respectively, except that they alleged the custom to be for every customary tenant of the *particular* customary tenement in question to take the coals, &c. under the soil of his own tenement.

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The replication to each of the pleas traversed the custom as therein alleged ; on which issue was joined.

At the trial before *Cresswell, J.*, at the last Worcester assizes, no evidence was offered in support of the custom set up in the fourth and subsequent pleas ; but the question was as to the existence of a general custom in the manor of Cannock and Rugeley, for the customary tenants to get coals and other minerals under the soil of their respective customary tenement. In order to establish the custom, the defendant proved numerous instances of working for minerals by the customary tenants in different parts of the manor (without license or interruption, so far as appeared), and also gave evidence of appearances of old workings in various places within the manor. The defendant also tendered in evidence two leases, each for twenty-one years, by tenants of the manor, containing a clause giving the lessees a right to take minerals, subject to a rent, and dated respectively in 1800 and 1802. The court rolls of the manor were produced, which simply stated the inolment of certain leases corresponding with the above in the date and parties. The latter of these two leases, which had no minute or description upon it to identify it with the entry on the court roll, was rejected ; the former had indorsed upon it a memorandum of the inolment, and it was received in evidence. The defendant also gave in evidence a surrender

(a) As to this form of plea, see *Morant v. Sign*, 2 M. & W. 95.

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of a customary tenement within the manor, by way of mortgage, by one Thomas Barton and Eliza his wife, and the admittance thereon, dated in May 1730. After the surrender of the tenement followed these words:—"Except always to the aforesaid Thomas Barton and Eliza his wife, and their heirs and assigns, from time to time, free liberty to make coal mines, sloughs, or drains, and all other things necessary to search for coals within the lands aforesaid, or any part or parcel thereof, and to convert the coals so found to the sole use and behoof of the said Thomas Barton and Eliza his wife, their heirs and assigns." Surrenders of other tenements, in some cases expressly reserving the minerals to the surrenderor, in others passing them by express words to the surrenderee, were also proved. The defendant then gave in evidence two accounts of the stewards of the adjoining manor of Wyrley, in the reigns of Richard II. and Henry IV., taking credit for payments made by them in respect of the manor, amongst which, under the head of "rent absolute," was "four shillings to the Bishop of Chester;" and annual payments were proved to have been made of the like sum of four shillings by the Duke of Sutherland, the present lord of the manor of Wyrley, to the plaintiff, by the hands of the bailiff of the manor of Cannock, "for the manor of Wyrley," as it was expressed in the receipts. It was contended that this payment, unexplained, led to a presumption that the manor of Wyrley was a sub-infeudation of the manor of Cannock, and therefore that evidence of the existence in the former manor of a similar custom to that now claimed in respect of the latter, was admissible. The learned Judge, however, refused to receive such evidence.

On the part of the plaintiff, a deed was tendered in evidence, dated the 2nd November, 3 Jac. 1 (1605), made between William, Lord Paget, lord of the manor of (inter alia) Cannock and Rugeley, of the one part, and Sir Walter Aston, and a great number of other persons, copyholders of the several manors therein mentioned, of the other part.

This deed recited, that whereas the said copyholders did severally and respectively hold to them and their several heirs, the several copyholds mentioned in the several schedules thereunto annexed, of the said Lord Paget, as of his said several manors, by several and respective copies of court rolls of the said manors, according to the several customs thereof, and by the several rents in the said schedules also mentioned; and whereas also the customs of the said several manors, of and concerning the said copyhold premises, all the time whereof the memory of man was not to the contrary, *had been claimed to be* in such manner and form as thereafter expressed:—the deed then proceeded to set forth the alleged customs, as to inheritance, descent, guardianship, dower, fines payable to the lord, powers of leasing and exchange, heriots, the right of felling timber without impeachment of waste, free common on the wastes of the manor, the right of getting heath, turf, clay, sand, earth, marl and gravel on the waste, escheat, suit and service at the lord's courts, &c. &c.; but making no mention of any custom for the copyholders to take minerals. The deed then proceeded to state, that whereas, at the humble petition of the said copyholders, by them made to the said Lord Paget, and for consideration of the sum of £1500 by them paid to him, “when he, the said Lord Paget, is well pleased that the said customs shall be allowed, ratified, and confirmed, as also the said copyholders are contented to submit themselves to the same, to the end certainty may be left in that behalf to their posterity:” therefore the said Lord Paget, in accomplishment of so much as on his part was to be performed, did, by those presents, for him and his heirs, allow all and every the premises, and did thereby ratify and confirm the said customs and every of them, and was contented and well pleased that the customs before mentioned, and every of them, should for ever thereafter *be the true customs of the said manors, for and touching all and every the said customary and copyhold lands and tenements before mentioned.* The Lord Paget then further

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covenanted with the said copyholders and every of them, and every of their heirs, executors, and assigns, that he, his heirs and assigns, should and would be bound by the said customs for evermore; and that the said copyholders, and every of them, their heirs and assigns, should and might for ever thereafter enjoy and use the same customs and every of them, without any let, trouble, denial, or interruption of him the said Lord Paget, his heirs or assigns, or any of them. And the said copyholders severally covenanted with the Lord Paget, that they, their heirs and assigns, should and would, at all times thereafter, submit themselves to the said customs, and be bound thereby, and pay and perform every thing on their parts to be performed in those presents mentioned or expressed, &c. Then followed this clause:—"And moreover, for that some matter or point of custom within the said manors, or some of them, herein not mentioned or expressed, may come in question, and for that also some doubts may be made of the true exposition of some matter or custom herein set forth, or of some circumstance thereof, therefore it is fully concluded and agreed between all the said parties, and every of them, that if any such matter, point, or custom shall, upon just cause come in question, then an indifferent jury of fourteen or sixteen copyholders of the same manor where such doubts shall arise, at some court for that purpose, shall be impanelled," &c. &c., to inquire and make presentment of the said matter, custom, or question, and that their presentment should bind all the said parties and their heirs for ever. And it was also agreed, that none of the ancient court rolls of any of the said manors should be thenceforth shewed, nor should be esteemed or taken, to impugn, prejudice, or hurt any of the customs in those presents specified or set down; and provision was made for the future keeping of the court rolls in a chest, with four locks and keys, in the church of Cannock, one key to be kept by the steward of the manors, another by the lord's bailiff, and the others by two indifferent copyholders.

Among the tenements specified in the schedule of the manor of Cannock, subjoined to this deed, were certain closes, stated to be held by Thomas Sprott, jun., (one of the parties signing the deed), which were shewn to be part of a tenement of which the defendant Lord Hatherton was now the owner (a).

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The plaintiff also tendered in evidence a decree in Chancery, dated 29th November, 4 Jac. 1 (1606), in a suit wherein Sir Walter Aston, knight, and others, were plaintiffs, and the Lord Paget, defendant; reciting, that they the said complainants, and their several ancestors and those whose estate they severally have had, claimed the customs of the said manors, of and concerning the said copyhold premises, to be as thereafter expressed, for and touching which customs and claim divers suits, questions, and controversies, had grown between the lords of the said manors and the copyholders before named, and others before them, copyholders of the said premises; for the final ending and determining of all which questions, controversies, and debates, and for avoiding all future doubts and controversies concerning the said customs, the defendant Lord Paget, and they the complainants, of their mutual consents and agreements, about six months then last past, did conclude and agree that the customs of the said several manors, of and concerning the said copyhold premises, thenceforth for ever should be esteemed and taken to be in manner and form as thereafter expressed, that is to say, [setting them forth precisely as in the deed]: and reciting, that the complainants further shewed that the said Lord Paget, in consideration of the sum of £1500 to him by the said complainants paid, was well pleased that the said customs should be allowed, ratified, and confirmed, and did acknowledge and confess that he

(a) Much discussion took place, both at *Nisi Prius* and before the Court, on the question whether the identity of this property was satis-

factorily established in evidence: but it is assumed for the purposes of this report that it was.

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was agreed that the customs before mentioned, and every of them, thereafter for ever should be the true customs of the said manors, for and touching all and every the said customary and copyhold lands and tenements before mentioned, and had promised that he the said Lord Paget, his heirs and assigns, and every of them, should and would be bound by the said customs for evermore, for and concerning the said copyhold premises, &c. &c. [proceeding as in the deed, ante, p. 224]: and stating the answer of the Lord Paget, confessing the allegations of the bill, and that he had promised and agreed to all the conclusions, premises, and agreements therein specified, all which he alleged that he was ready and willing to perform on his part, and was contented that the same should appear and remain of record, and be ordered and decreed by the Court to continue for ever, &c., so as such order and decree, and the said customs, should extend only to the said complainants, their heirs and assigns, and to their copyhold lands, tenements, and hereditaments, and to none other, and might not be hurtful nor prejudicial to the said Lord Paget, his heirs nor assigns, of, for, or concerning any other copyhold lands in any of the said manors, nor of, for, or concerning any duty out of the same: it was therefore, by and with the assent and consent of the said complainants and defendants, ordered and decreed, that all and every the said customs, conclusions, and agreements mentioned in the said bill, should have continuance for ever, in manner and form as in the bill contained, and that the said customs of the said several manors mentioned in the said bill, and every of them, from thenceforth for ever should be, and be esteemed and taken to be, the customs of the said manors, for and touching all and every the said customary and copyhold lands and tenements before mentioned, in manner and form as in the said bill expressed, that is to say, [setting forth the customs in the same terms as before]. The decree proceeded to confirm in all its parts the agreement stated in the deed: and concluded with a clause

stating that the said decree, nor anything therein contained, nor any the customs aforesaid, should extend but only unto the said complainants and defendants, their several heirs and assigns for ever, and to the said complainants' copyhold lands, tenements, and hereditaments, and to none other, and should not be hurtful nor prejudicial to the said Lord Paget, his heirs nor assigns, of, for, or concerning any other copyhold lands in any of the said manors, nor of, for, or concerning any duty out of the same.

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It was objected, on the part of the defendants, that the deed and decree were not admissible in evidence, on the ground that they constituted a mere agreement, for a pecuniary consideration, between the lord and the particular copyholders who were parties to the deed, in respect of the customs which were in future to apply to their particular copyholds, but did not amount to any admission of the non-existence of the particular custom alleged by the defendant, so as to be evidence against him. The learned Judge, however, received the evidence, holding the deed to be a declaration by Sprott, whose estate the defendant now had, what were the then existing customs of the manor.

In summing up the case to the jury, his lordship stated, with reference to the surrender of May 1730, produced on the part of the plaintiff, and the exception of minerals contained therein, that he was not prepared to say the steward could refuse to make the entry of the surrender on the court roll, or to make the admittance thereon, whatever might be the terms of the exception which the parties had introduced into the surrender, and whether they were, in point of fact, entitled to the right excepted or not; but that it was important as shewing that the agent of the lord had distinct notice that the parties were setting a claim to the minerals, to the prejudice of the lord, and it did not appear that any proceeding was in consequence taken on his part to put a stop to the work-

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ings. He made a similar observation as to the other surrenders, and the lease of 1800. And after stating all the evidence, he left it to the jury to say, whether they were of opinion that the copyholders of the manor had been proved to have had, from time immemorial, the customary right to take the mines and minerals. The jury found a verdict for the plaintiff.

In Easter Term, Sir *T. Wilde* obtained a rule nisi for a new trial, on the following grounds: first, that the evidence of the customs of the manor of Wyrley ought to have been received in evidence: on this point, the cases of *Champion v. Atkinson (a)*, *Duke of Somerset v. France (b)*, and *Rowe v. Brenton (c)*, were cited: secondly, that the deed and decree of 1605-6 ought not to have been received: and thirdly, that the learned Judge had misdirected the jury, in stating it as his opinion that the steward was bound to receive and inrol surrenders which professed to pass, or to reserve, any right to which the surrenderor was not entitled by the custom of the manor, and therefore had given too little effect to the surrenders proved on the part of the defendant: and also that he had erroneously stated the deed of 1605 as evidence of what were the immemorial customs of the manor, whereas it amounted to no more than a creation of the customs agreed upon in futuro.

The *Solicitor-General*, *Talfourd*, Serjt., *R. V. Richards*, *Whateley*, and *Whitmore*, now shewed cause against the rule.—I. The evidence of the custom of the manor of Wyrley was rightly rejected. It was suggested that that manor was a subinfeudation of the manor of Cannock; but no ground was laid for such a conclusion. No connexion was shewn between the Bishop of Chester, to whom the 4s. appeared to have been paid by the lord of the manor of Wyrley in

(a) 3 Keb. 90.

(b) 1 Stra. 654.

(c) 8 B. & C. 758; 3 Man. & R. 361.

ancient times, and the lord of the manor of Cannock, or in any way with that manor. The whole basis, therefore, of the argument for the defendant on this point fails, no connexion whatever being made out between the two manors; still less that that of Wyrley is a subinfeudation of the manor of Cannock. But even if it were, it does not follow that their customs should be identical. The subinfeudation must have been anterior to the statute of quia emptores, but at what date there is no evidence whatever. Supposing the subinfeudation to have been created before the reign of Richard I., why may not the customs differ? There is no foundation for the argument, unless it were shewn when and how the manors were separated. The decision in *Rowe v. Brenton* shews no more than this,—that where the inquiry is as to the incidents of a particular estate existing in a manor, and the same estate is found to prevail throughout a district, its incidents throughout that district may be looked to, to see what they are in the particular manor. The evidence was not tendered in that case to prove a custom, but to prove the nature of the general tenure in question. In the case of the *Duke of Somerset v. France*, the question was whether a fine was payable by the customary tenants of the manor to a tenant for life of the manor under a marriage settlement, on the death of the last admitting lord. Evidence was offered of instances of fines paid in like cases to lords of other manors. Lord *Raymond*, C. J., says,—“I have always looked upon it as a settled principle in the law, that the custom of one manor shall not be given in evidence to explain the custom of another manor; for if this kind of evidence should be allowed, the consequence seems to be that it would let in the custom of one manor into another, and in time bring the customs of all manors to be the same.” *Reynolds*, J., expressed the same opinion; although, upon the supposed authority of *Champion v. Atkinson*, and of a practice alleged at the bar to have existed on the northern circuit, the evidence was admitted.

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Fortescue, J., took the same distinction that was taken in *Rowe v. Brenton*, between evidence as to the *custom* and as to the *tenure* of a manor, and thought the evidence admissible as being referable to the latter question. And it appears, from a note of the reporter, that the Judges of the Common Pleas and Exchequer were all of opinion that the evidence ought not to have been allowed. It ought, therefore, in order to found this objection, to have been shewn that the manors were separated, with all their incidents, since the time of legal memory. [*Alderson, B.*—If a common origin were sufficient, which is the utmost extent to which this case can be carried, all manors have a common origin, namely, by grant from the Crown; therefore the customs of all manors would be receivable. For aught that appears, these manors might have had a common origin at periods when the customs would be different.]

II. The deed and decree of 3 & 4 Jac. 1, were rightly received in evidence. It was shewn that the present defendant derived title to a portion of his copyhold tenements from one of the parties to the deed. Now it is plain that that deed was executed in order to settle for all time to come the disputed customs of the manor as they then existed. The lord was thereby conceding the claims of the copyholders to their utmost limit, and receiving in return the large sum (at that day) of £1500: and when they are stating the customs of the manor in their own favour, no mention whatever is made of any right to take the minerals. Is not the then declaration of the copyholders evidence what were the customs of the manor? [*Rolfe, B.*—The argument on the other side is, that the deed is not evidence, on the ground that the Lord Paget had only agreed, in consideration of a sum of money, to admit such to be the customs in future.] It is not merely an admission that they should be such in future, but that they had been so for all time. It is put as being a payment for forbearance to claim more exten-

sive rights ; but it is much more : it is an admission by both parties of the existing customs, and is clearly evidence on a question touching the customs of the manor, arising at any time between the lord and the tenant of one of the same tenements therein mentioned.

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III. The learned judge was guilty of no misdirection whatever. With respect to the leases, nothing was shewn to have been done under them, and at best they were equivocal ; because if the lord had given his customary tenant a license to work mines, the latter would for that purpose require such an agreement with *his* tenant. The supposed misdirection in this respect is, that the learned judge told the jury the document was of no great weight, because the steward was bound to enrol the lease if brought to him, and it was not binding on the lord. But it is in no sense *misdirection* to give too much or too little weight to a *fact*, even if it appeared that it was done in this case. Then as to the supposed misdirection with respect to the deed of 1605, that objection, if it amounted to anything, would apply against the *admissibility* of the evidence. But in truth there was no misdirection in law, and the question in issue was clearly and fully left to the jury.

Sir *T. Wilde*, *Ludlow*, Serjt., and *W. J. Alexander*, contra.—I. As to the admissibility of the deed and decree. This was a contract by deed between the lord and certain tenants of the manor, and the suit was by bill for a specific performance of that contract, which was made in consideration of a sum of £1500. Why should the lord exact such a sum of money for admitting the ancient customs of the manor ? Reputation *post litem motam* is not admissible evidence of a custom ; the deed, therefore, cannot be receivable on that footing. This is an admission made on payment of a sum of money by the one party to the other. As the mere compromise of a dispute, it cannot be admissible against other persons. It is said, however, that it is a

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mutual admission as to their existing rights. Now it is part of the agreement that the ancient court rolls shall never be referred to, to disturb or impugn it: that is altogether inconsistent with its being a definition of the ancient rights of the parties. Besides, it is applicable only to the particular copyhold tenements of which the complainants were seised, and all the admissions have reference to them only, not to the manor generally. A *custom* is a law governing the district generally, and it is rather a *prescription* than a custom, if it apply only to particular tenements. Here the consideration and the admission are equally limited to the particular tenements. There is no admission in terms, that for the future the customs therein set forth shall be taken always to have prevailed. Then the fact of the parties entering into mutual covenants shews that the lord did not depend on the deed as being in itself a conclusive admission of the existing customs. It is observable that the course of descent provided for is not according to the custom of the manor, but according to the course of descent at common law. So as to the use of the coppice grounds; it is not to be according to the custom of the manor, but according to the laws as to the realm; and the same as to escheat. It is altogether a conventional arrangement between the particular parties to whom the concessions are made. Further, it clearly appears upon the face of the deed itself that there were other customs not expressed therein; customs, doubtless, as to which there was no dispute, and which therefore were not made the subject of the arrangement; and provision is made for settling them also if they should come in question, not in regard to the manor generally, but as to the parties to the deed, their heirs and assigns. And the decree expressly provides, that the customs therein set forth shall not prejudice the lord as to any other copyhold lands within the manor. It is, in truth, a protest against their being taken to be customs *of the manor*. This deed, therefore, was not

so made as to amount to a declaration by the copyholders of the ancient customs of the manor, so as to make it evidence as reputation, or as an admission by a predecessor in estate. But even if it was *admissible*, the learned Judge misdirected the jury, when he treated it as evidence of what the immemorial customs of the manor were, and laid it down that the omission, in the enumeration of the customs, of any mention of the right to take the minerals, was evidence from which the jury might infer that no such right existed immemorially.

II. The evidence of the custom in the manor of Wyrley ought to have been received. The question is, if Wyrley was held of the lord of the manor of Cannock at a chief rent of four shillings, what must have been the nature of the connexion between the rent and the manor? The payment of a chief rent imports the relation of landlord and tenant; the circumstance of its being paid to the bailiff of Cannock, (a manor in the same parish and leet), afforded sufficient ground, in the absence of any explanation, for the conclusion that the one manor was held of the other; and if the manor of Wyrley had been separated from that of Cannock, *prima facie* their customs must be taken to have been the same. There can be no inference of law that the customs have altered, although in fact new customs *may* by possibility have grown up; but this would constitute an objection to the *value*, not to the *admissibility*, of the testimony. It follows as a legal consequence, at all events until the presumption be rebutted by negative evidence, that, the same customs having of course been applicable to all the copyholds in the manor as it originally existed, upon the severance of a portion of it by the subinfundation, the part severed would retain them. There having been a time when the customs were identical, it is not to be presumed that on a sub-grant they have been altered. The rule of law, that the customs of one manor are not admissible in evidence on a question touching the

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customs of another, is laid down with this qualification in Phillipps on Evidence, Vol. I. p. 483 (8th edit.) :—" Unless some connexion or relation is proved to have existed between them, as by shewing that they were all formerly held under the same lord, or that the one manor was anciently parcel of the other manor, such evidence is not admissible : " in support of which position the case of *Moulin v. Dallison* (a) is referred to. So *Bayley, J.*, says, in *Rowe v. Brenton* (b)—" Generally speaking, a party cannot be allowed to prove the custom of one manor by evidence of a custom in another, unless a connexion between them be first established." The cases of *Champion v. Atkinson* (c), and *The Dean and Chapter of Ely v. Warren* (d), are authorities to shew that contiguity alone is sufficient to establish this connexion, if the entire district be of the same nature, as was the case here. So also, the case of *Duke of Somerset v. France* rests on the probability of connexion, and identity of customs, which the same locality was reasonably presumed to afford. It is obvious that the mode of shewing such connexion must vary according to the nature of the case, and cannot be universally the same.

[The point as to the alleged misdirection with respect to the leases and surrenders was abandoned.]

Lord ABINGER, C. B.—This case has been fully argued, and I am of opinion that the rule ought to be discharged.

Three points have been made for questioning the verdict. The first relates to the non-admission of evidence of the working of minerals in the manor of Wyrley; and it is contended that evidence was given to connect the two manors, in such a way as to authorize the reception of evidence of the customs of one manor, in order to throw light upon the customs of the other. The argument has been pushed by my brother *Ludlow* to such a length in that respect, as to leave it a matter of doubt whether he

(a) 1 Cro. Car. 484.

(b) 8 B. & Cr. 764.

(c) 3 Keb. 90.

(d) 2 Atk. 189.

does not contend that the general rule is, that the customs of one manor, if the two lie contiguous, are evidence of the customs of the other. But I have always understood, from the practice of the Courts in ancient times, which has not been altered to the present time, that there was no rule better established or more frequently acted upon than this, that the customs of one manor could not be given in evidence to prove the customs of another; because, as each manor may have customs peculiar to itself, (and this, which is contended for to-day, is admitted not to be a general or usual custom), to admit the peculiar customs of another manor in order to shew the customs of the manor in question, would be a very false guide for the purpose of leading to any such conclusion. If no such custom exist, or can be found in the manor in question, to shew that such a thing existed in a neighbouring manor, would be to put an end to all question as to the peculiar customs in particular manors, by throwing them open to the customs of all surrounding manors.

But there are, it is said, excepted cases; and one of the excepted cases that is contended for is, where one manor is held of another. Now that is a new proposition to me. I do not believe that can be satisfactorily established by any case. It was the custom of the Crown, in very ancient times, in granting a manor, to declare of what particular manor held by the Crown that manor should be held. Nobody ever contended that this gave an identity to the customs of the two manors. That which was the ancient custom, was followed out in almost all grants by the Crown since the dissolution of the monasteries; at least, in many cases which have come under my own knowledge, Crown manors were granted to be held of the manor of East Greenwich. It therefore is not at all a proposition based upon any established rule in Westminster Hall, that where one manor is held of another, their customs are identical. My brother *Ludlow* argues, that where one manor has been parcel of another, and has been separated by the lord and granted

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out, such might be the case. In order to make that case out, if it be an exception to the general rule, it should be established clearly and beyond all controversy that the two manors originally formed one manor. That is not necessarily the case here. I do not see that the fact of one manor paying a chief rent, if you please, to the lord of another manor, is a necessary proof that the two manors were at one time one manor; and therefore the foundation of the argument fails in that respect. I think it also fails in the attempt to connect these manors together in point of fact. The evidence is, that this 4*s.* was paid to the Bishop of Chester in very early times, for this manor of Wyrley, as part of his fee. There is not a tittle of evidence to connect the Bishop of Chester with the manor of Cannock, or to shew that the Marquis of Anglesey derives his title to the manor now in question from the Bishop of Chester. It may be so or it may not, but there is no evidence to shew it; the only evidence is, that a receipt is given, which shews that 4*s.* was received for the use of the Earl of Uxbridge by the bailiff of the manor. But that does not prove how he came by it, or how he held the manor of Cannock, or that Wyrley was held of that manor. Then another argument is, that it is in the same parish. But is the contiguity of the two manors of the least importance? It is admitted it is not. Then it is within the same leet. But the lord, who has a leet granted to him, has it granted to extend over his own and other manors in the neighbourhood. There are well-known instances of that; for example, the Duke of Beaufort's leets. His Grace has a great many manors, and he holds one leet for several manors. In the North of England nothing is more common than to have many manors comprised in the same leet. There is nothing, therefore, in the fact of these manors being in the same leet or the same parish, which has the least efficiency to connect them with each other. I therefore think it was not shewn, because the two manors were connected with the Earl of Uxbridge, that the one was

held of the other; and if it were, I think that would not alone be sufficient evidence to justify the proof of the customs of the one manor being received as evidence of the customs of the other. The excepted cases, when we come to look at them, really stand upon a very different footing. The case of the manors upon the border between England and Scotland is one. There prevails through those manors a particular species of tenure, called tenant-right. The tenure respecting those tenements is altogether different from the tenure respecting copyholds: they pass by lease and release, they descend from father to son, and there are peculiar customs belonging to that species of tenure. Now it being admitted that in these manors *all* the tenants hold under the same right, if it should happen that in one particular manor no example can be adduced of what is the custom in any particular case, it may be reasonable that in order to explain the nature of that tenure, which is not confined to one manor, but prevails in a great number, you may shew what is the general usage with respect to that tenure; and that is the whole extent to which those cases go.

But there is another connexion between manors, which might possibly admit this species of evidence; and that occurs in one of the cases which the learned Serjeant cited. It is well known that in the mining districts of Derbyshire and Cornwall, particular customs prevail. The custom in question in that case was not with respect to the minerals, but as to the rights of the miners. No question arose with respect to the right to the minerals as between the lord and the tenant; it was as to the rights of the miners as between each other: but if any question should arise with respect to the right to the minerals, in the mining districts, I do not pretend to say you might not give evidence of what has passed in one manor, for the purpose of shewing what has been the custom as to the right to the minerals in another manor. So again, the case of *Rowe v. Brenton*, which has been cited, stands upon a ground perfectly distinct. That was not at all a question of the customs

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of the manor; it was a question of what was the nature of the tenure of the assessional tenants; whether they belonged to one manor or the other, they held under the same title. It was not a *manorial* title. Since that case, by modern acts of Parliament, the nature of that title has, I believe, been settled; but it certainly did not originate in their copyhold interest; it apparently, and I believe really, originated in leases granted for seven years, and renewable every seven years, and of one year renewable every year, by the assession courts, embracing the whole of what are called the assessional manors. That gave an opportunity to say such was the *custom*, because at such a session such leases were granted in such a manor; and thus the judgment of the Court of Queen's Bench in that case did not relate to the tenure or the custom of the particular manor, but to the nature of the assessional tenure in all the manors, as ascertained from what was done in the one. Suppose there had been no manor at all, but in truth the land had been held under such assessional tenure, without being a manor; it would be evidence there in exactly the same manner as if it had been a manor. This shews that that decision has nothing to do with the question as to admitting the customs of one manor to prove the customs of another.

We then come to the second point, which is the more material one in this case, viz., the admissibility of the deed of 1605. Now, it will be observed, the issue the parties went down to try in this case was not an issue upon the customs as to a particular copyhold, or the claim of one single copyhold tenant, so that if the custom as to all the rest were negatived, that tenant would be entitled to the minerals; but the custom which the defendant undertakes to prove is, that *every* customary tenant of a customary tenement within the manor is entitled to the minerals. Would it not disprove that issue, to prove that half the customary tenants of that manor had positively disclaimed it? that not only they never did claim, but that they declared

they were not entitled to it? Now a custom lies in reputation; you prove a usage as far as you can prove the fact from the time to which human memory goes; beyond that the question in this case is open to evidence of reputation: and can it be denied, that if you shew that on a particular occasion half of the tenants all stated what their customs were, and did not include this custom of getting the minerals, that is evidence upon this issue, to shew what in early times the tenants admitted as the customs? In that case of *Rowe v. Brenton*, there were several instances adduced of the tenants of the particular manors making a claim and a statement of their customs; and they were all received, on the ground that claims made fifty or a hundred years ago would be evidence of what the tenant alleged to be the customs. Therefore, if in this case there had been actually no proof of any *identity* of the tenement which Lord *Hatherton* holds with that which *Sprott* held, who signed the deed, I am not prepared to say (though I give no positive opinion upon the subject—it is not necessary) that a deed proved to be signed by a great many of the customary tenants a hundred and fifty years ago, alleging what the customs were, or what they conceived them to be, at that time, would not be receivable in evidence, to negative the claim that all the customary tenants were entitled to the minerals. Suppose, instead of a deed, there had been a proceeding at the manor court by the steward, and it was entered upon the court rolls that the tenants were called upon to state what the customs were, that the steward might record it; and that the tenants had stated, and subscribed the statement, that they claimed the wood, but did not claim the minerals; can it be said this would not be evidence upon an issue of this kind—the issue not being with respect to a particular tenement, but whether a particular tenant had the right because the whole had the right? But I do not think it is necessary to go the length of deciding specifically that question, because it seems to me there is abundant evidence to shew that Lord *Hatherton* holds one at least, if not more,

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of the tenements held by Sprott, who signed that deed. We have, therefore, the case of two parties to the same deed, because the defendant is made a party to it, claiming under a party who signed the deed—Lord Anglesey claiming under the then lord; and the question is, whether a deed signed by those under whom both parties claim, touching the customs, is not admissible in evidence. I think it is admissible, more especially when the case is of such a nature as to call for evidence of the reputation of early times. Then what is this deed? It is a claim by the different tenants who signed it, to what they conceive to be the immemorial customs of the manor generally; and it is an admission by the lord of those customs, so far as regards those tenements only. He is cautious, though admitting it generally, not to admit it for the rest of the manor; but so far as regards their tenements, the claim they make to certain immemorial customs is confirmed and ratified. It has been argued that this was a creation of a new set of customs by convention. I do not think the deed at all justifies that interpretation: it is a claim of ancient customs by the tenants, and a ratification and confirmation of the claim in the terms stated, by the lord. It is true he takes care to prevent any prejudice arising to him from any claim by a tenant who is not a party to the deed; but that does not get rid of the effect derivable, not from the lord's acquiescence, but from the claim of the tenants. As between him and them, those are confessedly the customs of the manor for the future, and are claimed and admitted to be the customs. Then can any argument be more natural, or arise with more force from the reading of that document, than the very argument used by the learned Judge, and which is urged against him as a misdirection? He says, when they are claiming their ancient usages and rights, and when they, in order to purchase the lord's ratification of them, have given him a sum of money, can it be doubted that they would not have omitted such a claim as this, to the

minerals, at the very time that they claimed the trees, which could not belong to them but by custom—when they claimed the marl and gravel to be got from the lord's waste? I own it appears to me to be very strong evidence, much stronger even than the learned Judge represented it, that at that time it did not enter into their imagination that any custom existed in the manor that the customary tenants should have the minerals; especially as it was proved that minerals were worked at that period, and that they were of some value. This is only an observation to shew that they were less likely to have omitted the notice of them, and that is the only use the learned Judge made of it. Surely, if a custom existed at that time to give them a right to the minerals, it was natural to expect they would not have omitted it in an elaborate and minute statement of the customs, and they have not stated it. That is the observation of the learned Judge, an observation so strong that I do not wonder the jury should have felt the force of it, as I think I should have felt upon the same issue, and should have determined that the usage, of which evidence was given for a certain period, was not referable to any right founded upon a custom. On the other hand, the learned Judge makes an observation very favourable to the defendant's case; he says, usage cannot deceive you, because that is matter of fact, and documents may be liable to misapprehension and misinterpretation; and therefore, although I have made this observation upon the deed, it is for your judgment and consideration: you are the persons to decide upon it. He left the question to the jury as fairly, and I think as tenderly for the defendant, as any judge could possibly have done, and there is no pretence for saying there was any misdirection. He stated the effect of the deed as to this custom: what occasion was there to go into the question of other customs? There might be other subordinate and immaterial customs—that would not answer the argument. If among those customs existed one to claim the minerals, was it not

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natural that they should claim it at that period? How can one account for such an omission? They had a lord who would not even ratify the customs they did claim, unless they gave him a sum of money. I do not think it is purchasing his agreement to *new* customs, but his acquiescence in the ancient customs. The question is what they claimed these to be, and it cannot be denied they claimed them as immemorial customs; and surely among those customs they would have claimed the minerals. I think, therefore, that the evidence was properly receivable; that the effect was actually stronger than the learned Judge was disposed to give to it; and consequently that there was no misdirection. Upon these grounds, I think the rule should be discharged.

ALDERSON, B.—I am of the same opinion. It seems to me that the first point is clearly in favour of the plaintiff: that no evidence of the customs of the manor of Wyrley was properly receivable. Two things must be made out, in order to entitle the party to give such evidence: he must shew that the customs of Wyrley are the same as the customs of Cannock, and he must prove that Wyrley was derived from Cannock. Now, neither of those things appears to me to be established at all. There is no evidence which would at all have satisfied me that Wyrley was held under Cannock. The only circumstance is the payment to Lord Anglesey, through his bailiff, upon several occasions, of 4*s*. It is clear that the same payment was made in ancient times to the Bishop of Chester. Some connexion between Lord Anglesey and the Bishop of Chester is therefore shewn, but it by no means appears that that connexion arises out of the possession of the manor of Cannock. It may be that it arises out of the possession of some other manor; and if that connexion were shewn, it would prove that Wyrley was held of another manor, and not of the manor of Cannock. The matter ought not to be left in ambiguity; it should be shewn by the person.

who proposes to tender the evidence of the customs of one manor as evidence of the customs of another, by some reasonable evidence, that the customs of the one are the same as the customs of the other. If, indeed, there be some general connecting link between them, as, for instance, if the customs in question be a particular incident of the general tenure which is common to the two manors, then you have a right to shew what the custom of one manor is as to that tenure, for the purpose of shewing what the custom of the other manor is as to that tenure: but you must begin by shewing that there is a general tenure common to them both. That fact fails here; and therefore the case appears to me to fall within the general rule, that the customs of one manor cannot be given as evidence of the customs of another. The customs of manors are created by immemorial usage on the part of the lord and the copyholders. It is perfectly true, as was suggested in the argument by the *Solicitor-General*, that, inasmuch as this was a manor which must have been branched off, if ever it belonged to Cannock, before the Statute of *Quia Emptores*, and may have branched off long before the time of legal memory, there is nothing to shew that the customs of the manor of Wyrley might not have originated after it parted from the manor of Cannock, and yet be beyond legal memory. It appears to me, therefore, that the learned Judge was quite right, upon the evidence before him, in rejecting the evidence of the customs of the manor of Wyrley.

Then was he right, which is the main question in the cause, in receiving the evidence of the deed and the decree? Now what is the issue here? It is an issue whereby the defendant undertakes to shew that the customs of *the manor* authorize him to take these minerals. *He* is to establish the custom: he is to establish it, therefore, by evidence either of acts done by the lord and acts done by the copyholders, or declarations made by the lord, or acts which are entirely consistent with the existence of such a custom; and anything which negatives the conclusion to be drawn from

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those acts must of necessity be evidence for the lord, in order to negative that custom. Now, if there be an agreement, or an acting by any of the copyholders of the manor, under circumstances, which, if it be true that they so acted and agreed, render it impossible to believe in the existence of the customs at the time when they so acted and agreed, that acting and that agreement must be evidence whereby the jury would conclude (if it be proved to have occurred after legal memory) that the custom did not then exist, that that is not a custom from time immemorial, and that the subsequent usage, on which the defendant relies, is referable to usurpation, and not to right. It is in that way that the learned Judge received and gave effect to the evidence of the decree and the deed. He did not give it effect as proving what were the customs of the manor, but as negating this custom, which the defendant sets up as being a custom of the manor. He does not receive it *as containing* the customs of the manor, but as shewing that the custom of the manor which the defendant sets up does not exist. That is the only use and only effect which ought to be given, and which the learned Judge, as it seems to me upon reading the whole of his summing up, did give, to the deed and to the decree.

Then, if that deed and decree were receivable in evidence, it was surely very reasonable for the judge to say,—when those acts were done, would it not have been stated by the lord and his tenants, if the custom now set up had existed at that time? He left that question fully to the jury, and I cannot say that I disagree with them in the conclusion to which they came. But further, it seems to me that the deed was receivable in evidence, because I think the connexion between Lord Hatherton and Sprott, who signed the deed for his copyhold lands, is fully made out as to the very land in question, upon which the coal and other minerals were got. Upon the whole, therefore, it seems to me that the evidence was properly receivable; and having read the whole of the summing up of the Judge from the short-

hand writer's notes, I must say, considering the length and complexity of the case, there is not only no misdirection, but that it is a marvellously correct summing up.

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GURNEY, B.—I entirely agree with my Lord, that there is no ground whatever for the admission of the evidence with respect to the manor of Wyrley, inasmuch as the defendant wholly failed in shewing that the chief rent, even supposing it to be the same which was paid to the Bishop of Chester, was paid to Lord Anglesey in respect of the manor of Cannock; and therefore there was no ground laid for the admission of the evidence. Then with respect to the deed, the identity of the lands which were held by Sprott appears to me to be clearly made out, and I think it is clear that the deed was admissible. It is unnecessary to notice the observations made by the learned counsel for the defendant, about the overwhelming mass of evidence which was given of the usage. I only wish to be understood as not assenting to its being an overwhelming mass of evidence; I think the evidence of the usage is open to very strong observations, and that it by no means deserves the character he has given it.

ROLFE, B.—I entirely concur with the rest of the Court upon both points. With respect to the admission or non-admission of the evidence of the customs of the manor of Wyrley, the ground upon which I understood its admissibility to be rested by Sir Thomas *Wilde*, was this: he does not contend generally that the customs of an adjoining manor can be given in evidence to prove the customs of the particular manor in question, but he says the manor of Wyrley stands upon a distinct footing from a mere adjoining manor, for this reason; I undertake to prove, he says, that it is a sub-infeudation of the manor in question; that it is a grant of the Crown, held of the manor of Cannock. Having proved that, then he says it is competent to him to shew what are the customs of the sub-

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infeudation, because there can be no customs in that manor, which has arisen from the sub-infeudation, that did not exist in the original manor. Now I concur in thinking he has failed in shewing, at least with that distinctness with which in a question of this sort it ought to be shewn, that this is a sub-infeudation of the manor of Cannock. The most that can be said is, that he has given evidence which is perfectly consistent with it, and may render it not improbable that such may have been the fact. But he has wholly failed in proving the other step of the proposition. It is impossible to say there might not be a custom existing in the sub-infeudation, different from those existing in the original manor, for the reasons stated by my brother *Alderson*; because it must be shewn that the sub-infeudation took place after the time when the customs could lawfully have originated. There is an entire failure in that respect, and therefore upon that ground it seems to me that the evidence was properly rejected. I will just refer to one point upon this subject, which was dwelt upon by my brother *Ludlow*—I allude to the case which he relied upon, of *Champion v. Atkinson*; he says it was decided there that in questions of this nature evidence of the customs of other manors was receivable. I have looked at that case, and it appears to me to be wholly different, and not to come at all within the same principle as this. That was the case of a manor in Cumberland, and there being in that manor a custom to pay a fine on the death of the tenant, the question was, whether in such a case a grassum fine, as it is called, was payable when the lord succeeding was an infant; and upon that question, evidence was admitted to shew what was the custom of other manors where the grassum fine prevailed. That is not an analogous case to the present. Prove in a particular manor that borough English prevails, and then you may see what the peculiarities of borough English are from other manors: prove that gavelkind prevails, and you may see what are the customs of gavelkind in other manors. That appears to be

the principle on which the judgment in that case proceeds; it is in very few words, but it points out the extent to which the Court meant to go:—"Evidence for the defendant was, that other manors adjoining had the same custom, not to pay till age; which, per curiam, is good, and was allowed of copyholds entailed in the manors of Thisleworth and Hammersmith, in Middlesex." That I take to mean only this, that when it was proved there was a custom to entail, then the Court looked to another manor, where the same custom of entail existed, to see what were the incidents of such tenure. It appears to me, therefore, that that case in no respect established any such general proposition as has been attributed to it.

Then the other question is as to the admissibility of the deed. I concur entirely in the other observations which have been made, but the clear ground upon which I think it is admissible is, that it is distinctly shewn that Lord Hatherton claims in privity of estate under Sprott. There is not the slightest doubt he claims an estate which he derives from Sprott, who was a party to the deed. But then it is ingeniously suggested, that on spelling out this deed, it is not stated that the different copyholders who signed it, signed it in respect of all their copyhold tenements. Now in the first place, I should say there is nothing to be picked out of the deed either way, but the probability of the case is that they did. The improbability that the parties would not include the whole is so great, that I should have inferred that was the case; but I see circumstances in the deed which shew me by necessary inference that the whole is included. See what the customs are. One of them is, "If any copyholder die, the heir being within the age of fourteen years, then the next of kin to whom the inheritance may not descend, shall have the custody both of the body and lands of the same heir." Now the lands might be divisible, but if this custom does not extend to all the copyholders, what is to be the case as to the

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body of the heir? the body must be one. It must be, therefore, that the party who signed this must have meant all his lands to be included, otherwise there would be one party to have the custody of the body, and by the custom some other person should have had the body in respect of the estate. There are other customs inconsistent with the notion of its not applying to all the lands. The single heriot on the death,—how is that to be apportioned, if there were a variety of estates to which this deed did not apply?

It seems to me therefore distinctly deducible from this deed, that Lord Hatherton's privy in estate was a party to the deed, and he states, as one of the parties to it, that from time whereof the memory of man is not to the contrary, such and such were the customs, and there is no mention amongst them of minerals. Upon such an occasion, is it not to the last degree improbable that such a custom, if it existed, should not be pointed out? It seems to me that it is, and that no more than the proper effect of the deed was given to it by the learned Judge; and that therefore there is no ground to complain, either of the admission of the evidence, or of the mode in which it was left to the jury.

Rule discharged.

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COVENANT. The declaration stated, that, by an indenture dated the 10th day of May, 1828, J. T. Coward, C. T. Coward, S. Henley, and F. T. his wife, demised to the plaintiff a certain messuage and premises, with the appurtenances, for the term of twenty-one years from the 25th day of March then last, at a yearly rent; and that the plaintiff thereby covenanted with the lessors, that he the plaintiff, his executors, administrators, and assigns, should and would, at his and their own costs and charges, once in every three years of the term thereby granted, well and sufficiently paint all the outside wood and iron work of the said messuage and premises twice in good oil colour; and also once in every seven years of the said term thereby granted well and sufficiently paint all the inside of the said messuage and premises twice in good oil colour; and also should and would, from time to time and at all times during the said term thereby granted, well and sufficiently repair, uphold, support, maintain, pave, cleanse, empty, amend, and keep the said messuage and premises, with the appur-

A messuage and premises were demised to the plaintiff by a lease bearing date the 10th of May 1828, for the term of twenty-one years from the 25th of March then last; which lease contained covenants to paint the outside of the premises once in every three years, and the inside once in every seven years, and to repair and keep in repair the premises, and also to do any repairs which on a view of the premises by the lessor should be found wanting, of which notice should be given.

By a lease dated the 15th of June 1830, the plaintiff demised the premises to the defendant for the residue of the term, wanting ten days, containing covenants, with the exception of a stipulation as to painting the outside wood-work, in precisely the same terms as those contained in the original lease. The original lessors having brought an action against the plaintiff for breaches of the covenant to repair, he applied to the defendant to perform the repairs, and for instructions as to the course he should pursue with respect to the defence of the action. The defendant denied that any notice to repair had been given, and insisted that the premises did not require it; the plaintiff thereupon offered to suffer judgment by default, which the defendant refused to assent to. The plaintiff then gave the defendant notice, that as he had denied that any notice to repair had been served, and insisted that the premises were not out of repair, he should traverse the breaches of covenant assigned, and try the question, holding the defendant responsible for the costs. This he accordingly did, and the result was, that the original lessors recovered £68 damages, and 58*l.* 12*s.* for costs, and he himself incurred costs amounting to 53*l.* 14*s.* 4*d.*

Held, that the plaintiff was not entitled to recover from the defendant the costs of defending the action, as they were not necessarily occasioned by the defendant's breach of the covenant to repair.

Held, also, that although the covenants contained in the sub-lease were (with the exception of that relating to painting) the same in words as those contained in the original lease, they were, in effect, substantially different, the periods at which the leases were granted being different.

Semble, that the plaintiff ought to have paid the amount of the dilapidations into Court, instead of defending the action.

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tenances, in, by, and with all and all manner of needful and necessary reparations, cleansings, and amendments whatsoever (casualties by fire always excepted), when, where, and as often as need or occasion should be or require; and the said messuage and premises, being so well and sufficiently repaired, supported, maintained, sustained, painted, paved, cleansed, repaired, amended, and kept as aforesaid, should and would, at the end and expiration of the term thereby granted, or other sooner determination thereof, peaceably and quietly leave, surrender, and yield up unto the said J. T. Coward, C. T. Coward, S. Henley, and F. T. his wife, their heirs, executors, administrators, or assigns, together with all erections and improvements made and added or to be made and added thereon or therein, and all and singular other the fixtures and things mentioned and comprised in the schedule or inventory thereof thereunder written, in good plight and condition (reasonable use and wear thereof, and casualties happening by fire, to such fixtures in the meantime only excepted); and further, that it should and might be lawful to and for the said J. T. Coward, C. T. Coward, S. Henley, and F. T. his wife, their heirs, executors, administrators, or assigns, either alone or with workmen, at all reasonable times in the daytime, during the said term, to enter upon any part of the said demised premises, to view, search, and see the state and condition thereof, and upon any such view that he the plaintiff, his executors, administrators, or assigns, should and would, upon notice thereof being left at the said demised premises, within three calendar months next after any such notice, well and sufficiently repair, amend, and make good all and every the wants of reparation, whereof any such notice should be given or left as aforesaid (damage happening by fire excepted as aforesaid).—After making profert of this indenture, the declaration proceeded to state, that by another indenture, made be-

tween the plaintiff and the defendant, on the 15th day of June, 1830, the plaintiff demised the same premises to the defendant, for the term of nineteen years, wanting ten days, from the 25th of March then last, at a yearly rent, and the defendant thereby entered into covenants with the plaintiff, which wereset out, corresponding precisely in terms with those contained in the original lease, save that the outside painting was thereby stipulated to be done every three, instead of every seven years, and leave was reserved to "the original lessors," as well as to the plaintiff, to enter and view the repairs, and give notice. The breaches assigned were, that the defendant did not paint, that he did not repair, and that, although the original lessors entered upon the premises to view the state of repair, and, finding it defective, gave three months' notice of the defects, the defendant omitted, within that period, to repair: by reason of which said breaches of covenant, the plaintiff afterwards, and before the commencement of this suit, to wit, on the 4th December, 1842, was called upon, and forced and obliged to pay, and did then pay to the original lessors, the sum of 68*l.* for their damages, and 58*l.* 12*s.* for their costs, by them recovered in an action of covenant, which they brought against the plaintiff on account of certain breaches of the covenants entered into by the plaintiff with the original lessors in the said indenture firstly mentioned: and that the said covenants in the said indenture firstly mentioned, and the said covenants in the said indenture lastly mentioned, have a like force and effect, meaning and purport, and are in fact the same, and that the breaches of covenant, for and on account of which the original lessors recovered their damages and costs, were the same and not other than the breaches committed by the defendant; and the plaintiff was called upon, and forced and obliged to pay, and did pay 53*l.* 14*s.* 4*d.* for his costs, by him incurred in and about his defence to the said action. The defendant

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sustained damage to any greater amount, upon which issue
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was joined.

At the trial before *Gurney, B.*, at the Middlesex sittings in last Easter Term, it was proved that the original lessors, in April 1841, having surveyed the premises in question, left upon them a notice to repair the dilapidations mentioned in it, more than three months before they commenced an action against the plaintiff. The amount of those dilapidations was estimated by the lessors at about £200; and upon an action being commenced against the plaintiff, he had the premises surveyed, and, finding them defective, applied to the defendant to perform the repairs, and for instructions as to the course he should pursue with respect to the defence of the action. The defendant then denied that any notice to repair had been served, and refused to make any arrangement, and even refused permission to the plaintiff to enter and execute the repairs himself, insisting that the premises did not require them. The plaintiff thereupon offered to the defendant to suffer judgment by default, but to this step he would not assent; and at last the plaintiff served the defendant with a notice, that, as he denied that any notice to repair had been served by the original lessors, and insisted that the premises were not out of repair, he, the plaintiff, should traverse the breaches of covenant assigned by the original lessors, and try the question, holding the defendant responsible for the costs he might incur by doing so. This course he ultimately adopted, pleading a plea of *non est factum*. On the trial of that action, the result was that the original lessors recovered £68 damages, and 58l. 12s. for costs, and the plaintiff incurred costs to the amount of 53l. 14s. 4d. Upon the plaintiff claiming to be allowed the amount of these costs as damages in the present action,

the defendant objected that they were not the natural consequences of his breaches of covenant, and therefore he was not responsible for them. The learned Baron, however, overruled the objection, reserving leave to the defendant to move to reduce the damages to £68, and the plaintiff recovered a verdict for 180*l.* 6*s.* 4*d.*

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Gunning having obtained a rule to reduce the damages accordingly,

Knowles and *Martin* shewed cause.—The plaintiff is entitled to retain the verdict for the full amount. He must either have paid the sum demanded, or defended the action. He does the latter, by which he puts the parties to prove their case, and the lessors having recovered this amount of damages and costs from him, he is entitled to have them repaid him by the defendant. In *Neale v. Wyllie* (a), where the tenant, under a lease containing a covenant to repair, underlet the premises to one who entered into a similar covenant, and the original lessor brought an action on this covenant in the first lease, and recovered, it was held that the damages and costs recovered in that action, and also the costs of defending it, might be recovered as special damages in an action against the undertenant for the breach of his covenant to repair. That case is identical with the present. It was determined upon the ground that the plaintiff was entitled to recover the damages and costs which he had been compelled to pay in consequence of the defendant's breach of covenant. It may be said that the case of *Penley v. Watts* (b) has somewhat impaired that decision; but the Court expressly distinguish it from *Neale v. Wyllie*; and *Parke, B.*, there says, "If the circumstances had been exactly the same as they were in that case, we should have considered ourselves bound by it, although we cannot help thinking that the Court on

(a) 3 B. & Cr. 533; 5 D. & R. 442. (b) 7 M. & W. 601.

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that occasion had not exactly considered the relation of the parties, and the circumstance that the covenants were not in terms the same." In *Penley v. Watts* the covenants were *substantially* different; here the covenants are in effect the same: and therefore that case is no authority in the present. The cases on breaches of warranty are applicable to this case; because there the question is, what damages are the reasonable consequence of the breach of the contract of warranty. In *Lewis v. Peake (a)*, the plaintiff recovered the costs of an action brought against him, in consequence of his having warranted a horse sold to him by the defendant with a warranty. *Gibbs, C. J.*, there says, "The plaintiff was induced by the warranty of the defendant to warrant the horse to a purchaser; he gave notice to the defendant of the action, and receiving no directions from the defendant to give up the cause, he proceeded to defend, and was cast. Those costs and damages are therefore a part of the damages which the plaintiff has sustained by reason of the false warranty found against the defendant." That language exactly applies to this case. [*Parke, B.*—If you look at the opinions expressed by the Court in *Penley v. Watts*, you will find that that decision is very applicable to this case.] The covenants there were not alike, nor could the damages be so; here they are the same. These are damages and costs which the plaintiff was compelled to pay through the defendant's neglect to repair. In actions for breach of warranty, the plaintiff recovers not only the difference between the value of the horse and the price given, but also the incidental expenses, and the keep of the horse. In *Borrodaile v. Brunton (b)*, which was an action for breach of warranty of a chain cable, whereby the cable broke and an anchor attached to it was lost, it was held that the plaintiffs might, in addition to the value of the cable, recover the value of the lost an-

(a) 7 Taunt. 153; 2 Marsh. 431. (b) 8 Taunt. 535.

chor to which the insufficient cable was attached. Therefore it is clear that the damages may go beyond the strict line contended for on the other side. [*Parke, B.*—In *Lewis v. Peake*, the plaintiff was not aware at the time he sold the horse that the warranty was not complied with, and that was the ground on which the case was decided. But in *Wrightup v. Chamberlain (a)*, where the plaintiff had purchased a horse of the defendant with a warranty of soundness, and he sold it with a like warranty to J. S., and the horse turning out to be unsound, J. S. brought an action against him, which he defended, and failed; the jury having found that the plaintiff might, by a reasonable examination of the horse, have discovered that it was unsound at the time he sold it to J. S., it was held that he was not entitled to recover as special damages the costs incurred by him in defending the former action.] That was put entirely upon its being an improvident defence, and that the plaintiff could have found out the unsoundness by a reasonable examination. But here the plaintiff was misled by the defendant's false statement that he had not received notice, and also by his assertion that the premises did not require repairs, and he was not liable. The defence likewise was not improvident, as it was impossible for the plaintiff to ascertain what was the amount that ought fairly to be required, and it being a claim for unliquidated damages, he could make no tender, even if he had known the exact sum. The only method by which he could ascertain what he really ought to pay, was by bringing the matter before a jury to determine it.

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Kelly and Gunning, in support of the rule.—The case of *Neale v. Wyllie* is distinguishable from the present in several respects. The covenants are not set out there, and it does not appear that the plaintiff knew he had no defence

(a) 7 Scott, 598.

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to the action. In the present case, the plaintiff well knew that he had no defence, and it was his duty therefore to have suffered judgment by default. He had no right to go on, if he had no defence, when a third party was to be ultimately made chargeable; and here it is clear he was aware he had no valid defence. Even if there had been a covenant of indemnity, he would not have been justified in pleading a plea which he knew to be false, and incurring reckless and unnecessary expense. At the time when *Neale v. Wyllie* was decided, there were no means of paying money into Court, and a party was, therefore, obliged to suffer judgment by default, which the plaintiff in that case had accordingly done. The allegation in the breach ought always to be borne in mind, and that is, that the plaintiff was *forced and obliged* to pay the costs and damages incurred; that is not satisfied, unless it be shewn that the plaintiff was forced and obliged to defend the action, and unless he shews that, he is not entitled to recover. He ought to have paid money into Court, and then might have been entitled to costs up to the time of doing so. As was said by *Parke, B.*, in *Penley v. Watts*, "It was competent to the plaintiff to have paid the money into Court, and so not to have incurred the subsequent costs." The notice given by the plaintiff to the defendant clearly shews he was aware he had no defence. *Wrightup v. Chamberlain* establishes the general rule, that it is only in cases where the party believes he has a good defence, and that belief has been induced by the defendant, without negligence on the plaintiff's part, that he can recover the costs of defending the action. Here, moreover, the covenants are substantially different, and the observations of *Parke, B.*, in *Penley v. Watts*, upon the points of difference, are applicable. [*Parke, B.*—The covenant to repair being general in both the original and the underlease, they would be different in effect; because the defendant, being a sub-lessee, is only bound to put the premises in

the same condition as he found them at the time of the lease to him. Suppose this were a lease of a new house for one hundred years, and there were a general covenant to repair, and at the end of fifty years a person were to take an underlease, with a covenant in the same words, the latter covenant must be construed with reference to the state of the premises at the time.] That was so decided in *Stanley v. Towgood* (a), *Mantz v. Goring* (b), and *Gutteridge v. Munyard* (c). Here there was an interval of more than two years between the two leases, and the covenants may therefore apply to a very different state of things; the one would refer to the state of repair in 1828, and the other to that in 1830, which might be widely different; so that what would be a breach of covenant in the one case, might be consistent with performance in the other. They are, therefore, essentially different. The covenant to paint too varies in its terms. The plaintiff is in fact attempting to convert the covenant to repair into a covenant to indemnify, which is a totally different thing; and it would be great hardship to impose on the defendant a liability arising from the stipulations of the original lease, with the terms of which it is not shewn that he was ever acquainted.

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LORD ABINGER, C. B.—I have come to the conclusion, with great reluctance, that this rule must be made absolute. I do not think that the covenant entered into by the defendant extended to the payment of the whole of these damages, but only of that portion of them which was necessarily incurred by the plaintiff. Now the real damage he sustained was the sum of £68, being the amount recovered by the plaintiff in the former action. The costs were certainly incurred by the present plaintiff

(a) 3 Bing. N. C. 4; 3 Scott, Scott, 277, nom. *Young v. Mantz*. 313.

(c) 1 Moo. & Rob. 334.

(b) 4 Bing. N. C. 451; S. C. 6

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in his own wrong, for he could have put an end to the controversy between him and his lessor by the payment of that sum in the first instance, or he might have subsequently paid it into Court. If we held that any more damages were recoverable, there would be no limit; the only safe rule is, to confine the verdict to those which were the necessary result of the act complained of, viz. the want of repair; and I cannot see how it can be contended, that the costs of both the plaintiff and the defendant in the former action were the natural or necessary consequence of that act. I think the case of *Neale v. Wyllie* is not law, and that it was decided on a mistaken principle; and I think it is better that I should at once express that opinion, than attempt to make a distinction between that case and the present, since making distinctions which have no solid foundation only tends to keep up litigation. I concur in the decision of this Court in *Penley v. Watts*, which governs the present case.

PARKE, B.—I entirely agree with my Lord Chief Baron. This case is on all fours with that of *Penley v. Watts*, which certainly makes it extremely difficult to support the judgment in *Neale v. Wyllie*. Although the covenants contained in the sub-lease are, with the exception of that relating to painting, the same in language with those contained in the original lease, yet they are different in substance; the periods at which the leases were granted being different. It is now perfectly well settled, that a general covenant to repair must be construed to have reference to the condition of the premises at the time when the covenant begins to operate; and as the one lease was granted in 1828, and the other in 1830, allowing an interval of two years, it is clear that the covenants would not have the same effect, but would vary substantially in their operation. With this explanation, there is no distinction between this case and *Penley v. Watts*. Then these costs

were unnecessarily incurred: if the plaintiff had paid the amount of the dilapidations into Court, they would have been spared.

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GURNEY, B.—I entirely concur with the rest of the Court. The plaintiff may have been extremely ill-used; but I think he has no remedy.

ROLFE, B.—I think it would be very wrong for the Court to strain the meaning of covenants to that which may be thought reasonable, where the parties will not take the trouble to frame them in language by which their meaning can clearly be ascertained. We should be driven to great embarrassment, if we sought to supply what we considered as reasonably coming within the intention of the language used by them.

LORD ABINGER, C. B.—I wish to add, that I am by no means clear that, even if this had been a covenant to indemnify, these costs would have been recoverable, as that would only extend to costs necessarily incurred.

Rule absolute.

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HARRIS v. MORRICE.

The stat. 3 & 4 Vict. c. 33, is merely a declaratory act, and does not create any new exemption from toll.

In an action of debt by the trustee of a turnpike road against a lessee of tolls, the defendant pleaded, that, after the time of the demise to him, and before any rent became due, the stat. 3 & 4 Vict. c. 33, was passed, which took away certain of the tolls, and therefore the lease was void: —*Held* bad on general demurrer.

DEBT by the plaintiff, as a trustee appointed under a local act of the 5 Geo. 4, "for repairing the turnpike road from Dunchurch to Stonebridge, in the county of Warwick," (a) against the defendant, as lessee of the tolls, under an agreement dated 20th May, 1841, for one year from that date; with counts for the use and occupation of toll-gates, tolls, &c. The defendant pleaded (inter alia), to the first count of the declaration, that, at the time of the making of the said agreement, part of the tolls in that count mentioned were certain tolls for and in respect of all asses, sheep, swine, or other beasts or cattle, other than horses, and also of any waggon, cart, or other vehicle, other than carriages, which might cross the said turnpike-road upon which the said gates were erected, or pass for the space or distance of 100 yards or less along the said road; and that, after the making of the said agreement, and before any rent became due from the defendant under the same, the stat. 4 & 5 Vict. c. 33, was passed, by which the said tolls were taken away, whereby the agreement was void.

General demurrer, and joinder in demurrer.—The point stated for argument on the part of the plaintiff was, that the stat. 4 & 5 Vict. c. 33, did not make the said agreement void.

Peacock, in support of the demurrer.—This plea is no answer whatever to the action. The object of the stat. 4 & 5 Vict. c. 33, was to explain the meaning of the pre-

(a) By a clause of this act it was provided, that all the powers, provisions, exemptions, &c., contained in the stats. 3 Geo. 4, c. 126, and 4 Geo. 4, c. 93, except such as were thereby expressly

varied or repealed, should be as good and effectual for carrying that act into execution, as if they had been re-enacted and repeated therein.

vious turnpike acts, and not to create any new law or exemption. The defendant has enjoyed all that he bargained for under his agreement.

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The Court then called on

Willes, contra.—The local act, under which the plaintiff sues, contains no exception in respect of asses, cattle, &c., crossing a turnpike road; and although the 4 & 5 Vict. c. 33, professes to be merely declaratory, it was in truth an enacting statute. The defendant, consequently, was thereby deprived of a portion of the subject-matter of the demise, and it operated as an eviction by law; and this being a personal contract, no action could therefore be maintained upon it. *Stevenson v. Lambard* (a). The trustees, however, are in no respect prejudiced thereby, since they can recover upon the counts for use and occupation, upon which the rent may be apportioned: *Neale v. Mackenzie* (b); *Gardiner v. Williamson* (c). Where part of the subject-matter of a demise is taken away by the act of God, or of the law, which is not supposed to do wrong to any man, that is an eviction: Vin. Abr., Apportionment, K.; Co. Litt. 149. a. [*Alderson*, B.—Those authorities apply to the case of a demise of a definite thing—as a thousand acres. This is a demise of the tolls *by law payable*.] The declaration contains an averment that they were tolls payable by virtue of a certain act of Parliament, and the plea shews that part were taken away by a subsequent act of Parliament. The stat. 4 Geo. 4, c. 16, s. 2, contains an express provision for meeting a similar contingency, in the exempted case of *lime*; but the 4 & 5 Vict. c. 33, contains no such provision, and the rule of the common law must therefore apply, that in case of the taking away by law of part of the subject-matter of the demise, out of which the

(a) 2 East, 575.

(b) 1 M. & W. 747.

(c) 2 B. & Ad. 336.

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LORD ABINGER, C. B.—I think we should be putting a strange construction upon the act of Parliament, if we held that it rendered this lease void, merely because it alters the tolls that are to be payable. Numerous acts are passed from time to time, affecting the interests of persons who hold under leases, but the leases are not therefore void. There is nothing in the case like an eviction by the landlord. The plea is clearly bad, and the judgment must be for the plaintiff.

ALDERSON, B.—There are two answers to the defendant's plea. In the first place, it appears to me that this is merely a demise of such tolls as may by law be taken from time to time. What is the situation of the defendant? He appears to me to be merely a person substituted, under the provisions for letting the tolls, for the trustees themselves, and consequently entitled only to the tolls which they would otherwise receive. The substance of the thing is not changed by the demise. But further, I do not think the defendant has made out his first proposition, that the statute of the 3 & 4 Vict. *has* altered the tolls. It is merely an explanatory act, passed for the purpose of removing doubts on the construction of former acts, which leaves the tolls as they were before.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

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ATTORNEY-GENERAL v. THE EASTERN COUNTIES RAILWAY
COMPANY, and THE NORTHERN & EASTERN COUNTIES
RAILWAY COMPANY.

THIS was a case sent by the late Lord Chancellor (Lord *Cottenham*) for the opinion of this Court.

By an act of Parliament of the 12 Geo. 3, c. 38, certain commissioners are named and appointed, and constituted commissioners for carrying the said act of Parliament into execution, with power to appoint other commissioners in manner therein mentioned; and by the above act, the property of the then and future pavements of the streets, rows, lanes, and places to be paved by virtue of the said act, and all other materials, utensils, and things which should be provided or made use of for any of the purposes of the said act, from and immediately after the passing of the said act, were thereby vested in the said commissioners, and they were thereby authorized and empowered to bring or cause to be brought any action or actions, or to prefer and order and direct the preferring of any indictment, against any person or persons who should injure or destroy, steal, take, or carry away any part thereof; and by the said act also, the said commissioners may cause all trees, signs, sign-posts, sign-irons, dyers' racks, dyers', scourers', and barbers' poles, and all porches, pent-houses, boards, spouts, and gutters projecting into or over the highways or footways, and all other encroachments, projections, or annoyances whatsoever within the streets, rows, or lanes, or courts, yards, alleys, passages, and places to be paved by virtue of such act, to be taken down and removed. And by an act made and passed in the 28th year of the reign of his Majesty King George the Third, among other things, further powers were given to such commissioners, for prosecuting the erection, without leave as therein mentioned, of hoards within the said streets within the provisions of the said act, and for removing obstructions in such streets.

The Northern and Eastern Railway Company were entitled, under their acts of Parliament, the 6 & 7 Will. 4, c. ciii, and 2 & 3 Vict. c. lxxvii, to construct coverings or buildings by arches or otherwise over the public streets and thoroughfares, if it were necessary or reasonably convenient for the construction of their station, warehouses, &c., at Shore-ditch, in like manner as they were entitled to do for the construction of the railway itself.

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Another act of Parliament was made and passed in the 57th year of the reign of his late Majesty King George the Third, intituled "An Act for better paving, improving, and regulating the Streets of the Metropolis, and removing and preventing Nuisances and Obstructions therein;" and it was thereby provided, that the provisions thereafter contained should extend to all streets and public places which were then paved, or which might be thereafter paved, within the cities of London and Westminster and borough of Southwark, and any other parts of the Metropolis which were included within the weekly bills of mortality, and to all streets and public places which were then paved, or which might be thereafter paved, within the parishes of Saint Pancras and Saint Marylebone, in the said county of Middlesex, except only any parts thereof which might be therein particularly excepted. And by the said act of Parliament, various further powers are given to the commissioners under the local act thereafter referred to, with respect to the streets and places therein mentioned and referred to, and the removing obstructions therein; and, amongst other things, it was thereby enacted, that it should and might be lawful to and for the said commissioners or trustees, or other persons having the control of the pavements of the streets and public places in any parochial or other district within the jurisdiction of the said act, and for their surveyor or surveyors of pavements, from time to time and at all times thereafter to regulate or remove, in such manner as he or they should from time to time judge proper, all such projections and obstructions as therein mentioned, from the point or sides of any house or houses, or other buildings, or then affixed or belonging to, or which should be hereafter affixed or belong to any house or houses or other buildings, in or abutting upon or contiguous to any streets or public places in any parochial or other district within the jurisdiction of such act, or to the owner or owners, or occupier or occupiers, of any such houses or other buildings, and which, in the judgment of

the said commissioners or trustees, or other persons as aforesaid, or of their surveyor or surveyors of pavements for the time being, then did or might obstruct the circulation of light or air, or were inconvenient or incommodious to any passengers along the carriage-ways or foot-ways of any of the said streets or public places of or within the jurisdiction of the said act, or any part thereof, or to any inhabitants of such parochial or other district.

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The several above-mentioned acts are public acts.

The parish of Christ Church is within the weekly bills of mortality.

Among the streets and places subject to the powers of the commissioners under the said acts, is the south side of a street or place called Goddard's-rents, and the east side of a street called Wheeler-street, and a court called Bell-court.

The street called Goddard's-rents is in length about 124 feet, and runs east and west, and is terminated at the west end thereof by Cock-hill, which commences at the west end of Goddard's-rents, at very nearly right angles therewith, and runs to the north into Anchor-street; and the said street called Goddard's-rents is terminated at the east end thereof by Wheeler-street, which runs north and south across the said east end of Goddard's-rents into Anchor-street aforesaid; and on the east side and out of Wheeler-street, the said court called Bell-court runs in an easterly direction.

The line of division between the parish of Christ Church and the parish of St. Matthew, Bethnal-green, runs along the centre of Goddard's-rents, the north side of such line being in the parish of St. Matthew, Bethnal-green. The line of division between the said parishes of Christ Church and St. Matthew, Bethnal-green, for part of the way up Wheeler-street, on the north side of the termination of Goddard's-rents, is in the centre of Wheeler-street, the west side of such line being in the parish of St. Matthew,

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Bethnal-green, and the east side thereof in the parish of Christ Church. The whole of the court called Bell-court is in the parish of Christ Church.

An act of Parliament was made and passed in the 6th and 7th years of the reign of his late Majesty King William the Fourth, intituled "An Act for making a Railway from London to Norwich and Yarmouth, by Romford, Chelmsford, Colchester, and Ipswich, to be called the 'Eastern Counties Railway;'" and the last-mentioned act was amended, and the powers thereby given enlarged, by another act made and passed in the 1st and 2nd years of the reign of her present Majesty, intituled "An Act to amend and enlarge the Powers and Provisions of the Act relating to the Eastern Counties Railway;" and by each of these acts it was provided that the same should be deemed and taken to be public acts, and should be judicially taken notice of as such.

Another act of Parliament was made and passed in the 6th and 7th years of the reign of his late Majesty King William the Fourth, intituled "An Act for making a Railway to form a communication between London and Cambridge, with a view to its being extended hereafter to the Northern and Eastern Counties of England;" and by this act, also, it was provided that the same should be deemed and taken to be a public act, and should be judicially taken notice of as such.

Another act of Parliament was made and passed in the 2nd and 3rd years of the reign of her present Majesty, intituled "An Act to enable the Northern and Eastern Railway Company to alter the Line of their Railway, by forming a Junction with the Eastern Counties Railway, to provide a Station and other Works in Shoreditch, and to amend the Act relating to the Northern and Eastern Railway;" and by this act, also, it was provided that the same should be deemed and taken to be a public act, and should be judicially taken notice of as such.

The Eastern Counties Railway Company, under the powers contained in the acts for that purpose, proceeded to take the necessary premises for the making of the Eastern Counties Railway, and the line of such railway was constructed upon a viaduct, of the average height of twenty feet or thereabouts, carried by means of arches over the several streets and places which it crossed. Prior to the passing of the act 2nd & 3rd of her present Majesty, the viaduct had been constructed in the vicinity of the places before mentioned, crossing Wheeler-street by an arch, and preparations had been made for forming the station of the Eastern Counties Railway Company in the same immediate vicinity, and on a level with the viaduct. The two companies, under the power given to them, purchased and pulled down the houses on each side of Goddard's-rents, and the houses on Cock-hill, and the houses on each side of Wheeler-street, to the south of Goddard's-rents, at its junction with Wheeler-street, and the said respective companies also purchased and pulled down some of the houses in Bell-court.

Goddard's-rents and Cock-hill have always been and are public thoroughfares for passengers, with a carriage way from Wheeler-street along Goddard's-rents to the end of Cock-hill, where posts precluded any thoroughfare for carriages. Bell-court has also been and is a public thoroughfare for foot passengers, and Wheeler-street has also been and is a public thoroughfare for carriages. The said courts and places continue to be of the same width as they respectively were before the houses were pulled down and removed.

After the passing of the said act 2nd & 3rd of her present Majesty, preparations were made for covering over the whole of Goddard's-rents and part of Cock-hill, and crossing Wheeler-street and covering over part of Bell-court, such covering over the said several places being intended for the laying and constructing a railway or railroad from the in-

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tended station of the Northern and Eastern Railway Company to the Eastern Counties Railway, and also for the constructing of certain other works, the said companies claiming to be entitled to construct by the means aforesaid a station and depôt, with the necessary warehouses, buildings, works, and conveniences.

The case then stated the filing of an information in the Court of Chancery, praying an injunction against the Eastern Counties Railway Company and the Northern and Eastern Railway Company, and each of them, to restrain them "from constructing or erecting and making, or causing to be constructed or erected and made, any covering or building over the way or passage through Goddard's-rents, or over the way or passage through Cock-hill, or over Wheeler-street and Bell-court, and from doing any act whereby or by means whereof the free admission of the light and air in or to the said streets or passages might be obstructed or hindered:" a motion made in pursuance of notice, in the same terms, and an order made by the Lord Chancellor, dated 17th August, 1841, whereby his lordship ordered that an injunction should be awarded, to restrain the defendants, the Eastern Counties Railway Company, and the Northern and Eastern Railway Company, their agents, servants, and workmen, from constructing or making any covering or building over the way or passage through Goddard's-rents, or over the way or passage through Cock-hill, or over Wheeler-street, or over the way or passage through Bell-court, in the information and bill mentioned, further or otherwise than might be necessary for the purpose of constructing a railway from the station of the Northern and Eastern Railway Company to the Eastern Counties Railway Company, in pursuance of the power given by an act passed in the 2nd and 3rd years of the reign of her present Majesty, intituled, &c. And that, by consent of the Attorney-General, it was ordered that a case be made for the opinion of the Judges of Her Majesty's

Court of Exchequer, upon the following question, viz. :— Whether the said defendants, the Eastern Counties Railway Company and the Northern and Eastern Railway Company, both or either of them, were entitled to construct or make any covering or building over the way or passage through Goddard's-rents, or over the way or passage through Cockhill, or over Wheeler-street, or over the way or passage through Bell-court, in the information and bill mentioned, further or otherwise than might be necessary for the purpose of constructing a railway from the station of the Northern and Eastern Railway Company to the Eastern Counties Railway, in pursuance of the said powers contained in the before-mentioned act of Parliament.

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The defendants, the Eastern Counties Railway Company and the Northern and Eastern Railway Company, insist, that under the powers given to them by the said acts of Parliament, or one of them, they, or one of them, have or has power to cover over for other purposes, as before mentioned, than may be necessary for the purpose of constructing a railway or railroad from the station of the Northern and Eastern Railway Company to the Eastern Counties Railway, the ways and passages in the information mentioned, and parts of them.

The *Attorney-General*, for the relator.—The acts of Parliament referred to in the case (a) do not authorize the

(a) The following are the material sections of the railway acts :—

6 & 7 Will. 4, c. ciii, s. 31, after giving the Company (the Northern and Eastern Railway Co.) the power of entering upon lands, &c., enacts, "that for the purposes and subject to the provisions and restrictions of this act, it shall be lawful for the said Company, their agents and workpeople, and all other persons by them authorized, to make

or construct upon, across, under, or over the said railway or other works, or any lands, *streets*, hills, valleys, roads, railroads, or tramroads, rivers, canals, brooks, streama, or other waters, such inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, *piers*, *arches*, cuttings, and fences, as the said Company shall think proper, and to divert or alter the

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Northern and Eastern Railway Company to arch over public thoroughfares for any other purpose than the con-

course of any roads or ways, or to raise or sink any roads or ways, the more conveniently to carry the same over or under, or by the side of the said railway; and also in or upon the said railway, or any lands adjoining or near thereto, to erect and make such toll and other houses, warehouses, yards, stations, engines, and other works and conveniences connected with the said railway, as the said Company shall think proper; and also from time to time to alter, repair, &c., and generally to do or execute all other matters and things necessary or convenient for constructing, maintaining, altering, or repairing and using the said railway and other works by the said act authorized, they the said Company doing as little damage as may be, &c., and making satisfaction, &c."

The 2 & 3 Vict. c. lxxvii, s. 1, recites, "that it would be greatly beneficial to the Northern and Eastern Railway Company, and also of advantage to the public, that the Northern and Eastern Railway should be provided with a station, yard, warehouses, and other conveniences, near to the London depôt or terminus of the said Eastern Counties Railway."

Sect. 5 enacts, "that it shall be lawful for the said Northern and Eastern Railway Company, and they are hereby empowered, to provide a station, depôt, and yard, and to erect warehouses, and such other buildings, works, and conveniences, with all necessary approaches, as they shall think pro-

per for the purposes of their said railway undertaking, and to construct a railway from such station to join the said Eastern Counties Railway, in the respective parishes, townships, and extra-parochial places of Saint Matthew, Bethnal Green, Christ Church, Spitalfields, and St. Leonard, Shoreditch."

Sect. 6. "It shall be lawful for the said Northern and Eastern Railway Company, and they are hereby empowered, for the purposes aforesaid, to take the lands and buildings described in the schedule to the said act; and all the clauses, powers, provisions, directions, regulations, liabilities, and restrictions contained in the said Northern and Eastern Railway Act, and in any act passed for extension of the same act, relating to the compulsory purchase of lands for making the said Northern and Eastern Railway, shall extend and apply to the purchase of lands and buildings for the railway hereby authorized to be made, and for the station, depot, yard, warehouses, works, buildings, conveniences, and approaches hereby authorized to be made and provided, as fully, to all intents and purposes, as if such clauses, powers, provisions, directions, regulations, and restrictions were herein repeated and re-enacted, with respect to the land and buildings hereby authorized to be taken as aforesaid."

Sect. 67. "In crossing all roads, public roads, courts, and alleys in the said parishes, respectively, for the purposes of making the said

struction of their line of railway. They have no power, therefore, to arch them over for the purpose of erecting a *station*. The 5th section of the 2 & 3 Vict. c. lxxvii, does no more than give them the power of providing a station, yard, warehouses, &c., but says nothing as to the manner of its construction. The 31st section of the 6 & 7 Will. 4, c. ciii, empowers them to make or construct "upon, across, under, or over any lands, *streets*, &c., such inclined planes, tunnels, embankments, &c., &c., *arches*, cuttings, and fences, as they shall think proper," . . . "and also, in and upon the said railway or any lands adjoining or near thereto, to erect and inclose such toll and other houses, warehouses, yards, *stations*, and other works and conveniences connected with the said railway, as the said company shall think proper;" and generally "to do and execute all other matters and things necessary or convenient for constructing, maintaining, &c., the said *railway and other works* by the said act authorized:" but the terms of this clause do not authorize to erect a *station* over a *street*. The powers and authorities given by this section are to be

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railway hereby authorized to be made, the said railway shall be so formed, and for ever continue, as to leave a clear and open space for such streets, roads, public ways, courts, and alleys; and that all arches underneath the last-mentioned railway shall open across the whole width of such roads, streets, public ways, courts, and alleys, including the footpaths thereof respectively; and that the forms of the said arches shall be either semi-ellipses or segments of arches, and that none of the said arches shall be less than sixteen feet clear in height; and that the present levels of the said roads, streets, and public ways, shall not in any manner be altered

or interfered with, unless in cases where the commissioners of paving, or trustees holding jurisdiction over such streets, &c., shall consent, in writing, that the said archway shall be of less dimensions, or that the levels of any such roads, &c. shall be altered."

Sect. 73. "Nothing in this act contained shall extend to prejudice, derogate, or diminish any of the privileges of any parish over which the said railway shall pass, under and by virtue of the said act of the 57 Geo. 3, or any local act or acts of Parliament, but that the same shall be in full force and effect as if this act had not been passed."

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construed *reddendo singula singulis*. The company, therefore, can erect *stations* only in and upon the railway itself, or any adjoining lands; the power to make erections over streets being confined, by the proper construction of the clause, to such as are necessary in the construction of the *line of railway*. It is always to be remembered, that acts of Parliament of this kind, being in the nature of bargains between the undertakers and the public, are not to receive an extended construction as against the latter.

The *Solicitor-General*, for the defendants.—Upon a comparison of the several clauses of these acts of Parliament, it is clear that both these companies have the power of erecting *stations*, as well as constructing the line of railway itself, upon arches thrown over the public streets. It is obvious that without stations the railway would be useless. The Eastern Counties Railway had, as appears by the case, already carried their line of railway over Wheeler-street. Now the 2 & 3 Vict. c. lxxvii recites, in the preamble, that it would be of advantage to the public that the Northern and Eastern Counties Railway should have a station near the *dépôt* of the Eastern Counties Railway; and the 5th section then proceeds to empower the former Company to provide a station, warehouses, &c., and to construct a railway *from such station*, to join the Eastern Counties Railway. The two railroads, therefore, were clearly intended to be upon the same level, and it was essential that the new station should be on that level also. Then sect. 6 enacts, that all the powers, provisions, &c., in the Northern and Eastern Railway Act, 6 & 7 Will. 4, c. ciii, shall apply to the purchase of land and buildings for the railway thereby authorized to be made, and for the *station*, *dépôt*, &c. thereby authorized to be made and provided, as if they were therein repeated and re-enacted. Those words clearly incorporate into this act the provisions of the 6 & 7 Will. 4, c. ciii, s. 31, and amongst them that of making, for the

purposes as well of the new line of railway as of the station, arches over the public streets. [He contended also that the commissioners under the Paving Acts had no power, under their acts, to control these proceedings of the railway companies; but as the Court did not give judgment on this point, that part of the argument is omitted.]

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The *Attorney-General*, in reply, insisted, that as the 73rd section of the 2 & 3 Vict. c. lxxvii, expressly enacted that nothing therein contained should prejudice or diminish the privileges of any parish over which the railroad should pass, the Paving Commissioners had the power, under their acts, of removing any part of the railroad which should be an obstruction to the street.

Cur. adv. vult.

The following certificate was afterwards sent to the Court of Chancery:—

“We are of opinion that the Northern and Eastern Counties Railway Company were entitled, if it was necessary or reasonably convenient for the construction of a station and proper warehouses, to construct and make coverings or buildings, by arches or otherwise, over the public streets mentioned in the said case, in like manner as they were entitled to do for the construction of the railway itself; and that by their last act of Parliament they were expressly authorized to construct such station and warehouses at or near High-street, Shoreditch” (a).

“ABINGER.

J. PARKE.

E. H. ALDERSON.”

(a) See the report of the case in the Court of Chancery, *Railway and Canal Cases*, Vol. 2, p. 823.

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A challenge to the array or to the polls ought to be propounded in such a way at the trial as that it may be then put upon the *nisi prius* record, so that the other party may either demur or counterplead, or deny the matter of challenge; and unless the challenges are so put on the record, the party is not in a condition as a matter of right to insist upon them.

Although the Court would probably in some cases, where a valid challenge has been made and over-ruled at *nisi prius*, but omitted to be put upon the record, grant a new trial, they will not do so where the party must have been aware of the ground of challenge before the trial, and might by moving to change the venue have obviated the objection.

The MAYOR, ALDERMEN, and BURGESSES of the Borough of CARMARTHEN *v.* EVANS and Others.

THIS was an action of assumpsit for rent payable in respect of the use and occupation of certain market stalls and premises, together with the tolls, brought by the mayor, aldermen, and burgesses of the borough of Carmarthen against the defendant Evans, and two persons who had become his sureties. The venue was laid in the county of the borough of Carmarthen; and Evans having pleaded non assumpsit, and the two other defendants having suffered judgment by default, the cause came on for trial before *Maule, J.*, at the last Spring Assizes for the borough of Carmarthen. The defendant Evans then challenged the array, on the ground that the sheriff, who returned the jury panel, was a member of the corporation, and the polls, on the ground that each juryman called was likewise a member. These challenges were overruled by the learned Judge, and thereupon *J. Evans*, as counsel for the defendant Evans, declined to appear and try the cause. The challenge, however, was not put upon the record. The plaintiffs proceeded, and having recovered a verdict, the defendant Evans, in Easter Term, obtained a rule to shew cause why the judgment should not be arrested, or the verdict set aside, on the ground of the validity of the above challenges. Against this rule

E. V. Williams now shewed cause.—The learned Judge having decided the validity of the challenges against the defendant, he ought to have put the challenges upon the record, if he wished to avail himself of them; and not having done so, he is not now in a situation to insist upon the objection. This subject was very fully discussed in the case of *Rex v. Edmonds (a)*; and *Abbott, C. J.*, in delivering

the judgment of the Court in that case, says, "Every challenge, either to the array or to the polls, ought to be propounded in such a way that it may be put at the time upon the nisi prius record; and so particular were they in early times, when challenges were more in use, that it was made a question in 27 Hen. 8, 13 B., pl. 38, whether it was not a fatal defect to omit the concluding of it with an 'et hoc paratus est verificare;' and it was because many precedents were shewn without such a conclusion, and the justices did not choose to depart from the precedents, that it was held unnecessary." It is then stated, that when a challenge is made, the adverse party may either demur or counter-plead, or he may deny what is alleged for matter of challenge; and it is then only that triers are to be appointed. After quoting various instances in which the objections had been put upon the records, his Lordship thus proceeds: "The challenges, therefore, ought to have been put upon the record, and the defendants are not in a condition in strictness to ask of the Court an opinion upon their sufficiency." That is a distinct authority that no party can take advantage of a challenge, unless it be put upon the record: and this is a case in which the Court will adhere to the strict rules of law, since here the defendant was aware of one at least, if not of both of the objections, long before the trial, and might have moved to change the venue; instead of which he abstained from so doing, that he might at the trial avail himself of it as a vexatious defence. *Goodright d. Richards v. Williams (a)* was cited as an authority for arresting the judgment; but that case is very distinguishable, for there the venire was obviously wrong on the face of the proceedings; but this not being an objection on the record, the same argument does not arise.

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Evans, in support of the rule.—The ancient rule, as to

(a) 2 M. & Selw. 270.

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the necessity of putting this objection upon the record, no longer prevails, and it is now not usual to do so. The case of *Rex v. Edmonds* is in the defendant's favour. *Abbott, C. J.*, after saying that in strictness the challenges ought to have been put upon the record, says, "But notwithstanding this defect of form on the part of the defendants, the Court has taken into consideration the validity of these challenges; and it is on the ground of their invalidity, not on the defect of form, that we think the rule ought to be refused." That is a clear authority to shew that the Court will, upon such a motion as the present, entertain the validity of these objections. As to the argument that the defendant ought to have moved to change the venue, it is a sufficient answer to say that it was not his but the plaintiffs' duty to have done that. They laid the venue where it was, and knew who were to try the cause. They might have suggested the circumstance that the sheriff was a corporator, and procured the venire to be awarded to the coroner or elisors. In Co. Lit. 157. b., it is laid down thus:—"If the defendant may have a principal cause of challenge to the array, if the sheriff return the jury, the plaintiff in that case may, for his own expedition, allege the same, and pray process to the coroners; which he cannot have, unless the defendant will confess it; but if the defendant will not confess it, then the plaintiff shall have a *venire facias* to the sheriff, and the defendant shall never take any challenge for that cause; and so in like cases. But on the part of the defendant any such matter shall not be alleged, and process prayed to the coroners; because he may challenge the jury for that cause, and can be at no prejudice." [*Parke, B.*—The defendant might, however, have moved to change the venue if he had thought it worth his while. *Lord Abinger, C. B.*—Why should we relieve you, when you had so easy a mode of relieving yourself, by application to a judge at chambers?] It is not the prac-

tice to do so. In *Rex v. Dolby* (a), the matter was controverted and tried, and the panel was quashed on the ground of unindifference in the sheriff. The doctrine laid down by Lord Coke has never been contravened, and that is in accordance with the practice. [Lord Abinger, C. B.—It is the frequent practice to make applications to the Court or a Judge at chambers respecting the supposed partiality of juries in particular cases. *Parke*, B.—The corporation in this case, in point of fact, are not the real parties. The money would not in any way go into their pockets.] But they are interested in the rate being established, for if the public funds are not sufficient, they must then be rated.

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LORD ABINGER, C. B.—I think this rule ought to be discharged. With respect to the motion in arrest of judgment, I am of opinion that it cannot be supported, for, looking at the Municipal Corporation Act, it does not appear that either the sheriff or any one of the jury must necessarily have been a member of the corporation. As to the interest of the jury in the result of this suit, that is also uncertain; for they might not have any property on which a rate could be made. At all events, therefore, the objections urged in this case were only matters of challenge: and whether, if the challenge upon those grounds have been put upon the record, it would have been valid, it is unnecessary to consider; for then the result might have been that the Judge would have had a new panel, or the cause might not have been tried at all. The objections urged must have been obvious to the defendant from the very first, as he knew the venue was laid in the borough of Carmarthen; and if he had wished to avail himself of them, he might have applied to change the venue, which is every day's practice, and is a simple and cheap mode of obviating such a difficulty. The object of the defendant was, however,

(a) 2 B. & Cr. 104; 3 D. & R. 311.

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to put the parties to expense, and he deserves no indulgence; and although, if the omission had arisen from the mistake of counsel, or the defendant had been misled by the dictum of the Judge at *Nisi Prius*, we might have granted a new trial and changed the venue; yet that could only have been done on an affidavit of merits, which are not suggested here, and payment of the costs. The result of granting a new trial would only be, that the defendant would go down again and lose it, and in mercy to him we ought to refuse this application.

PARKE, B.—The sheriff, in this case, was not necessarily incompetent to summon the jury, nor the jury to try it; it is possible that not one of them might be a member of the corporation, or even an inhabitant of the borough, for they might all be resident beyond its limits within the county. The objection, therefore, must have been suggested by a challenge, and that has not been made in a proper manner at the time and place where it should have been taken. The defendant, consequently, can only ask for a new trial as a matter of favour; and I think this is not a case in which we ought to assist the defendant at all. This rule must therefore be discharged.

GURNEY, B., and ROLFE, B., concurred.

Rule discharged.

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GRAZEBROOK and Another v. PICKFORD and Another (a).

THIS was a case in which an application had been made by the defendants to a judge at chambers, under the first section of the Interpleader Act, 1 Will. 4, c. 58, under the following circumstances:—The defendants, who are common carriers, received on board one of their boats, in Staffordshire, certain goods consigned to one Charles Hoppe, of Blackfriars-road, Surrey. Before the delivery of the goods to Hoppe, they were claimed by the plaintiffs, the vendors, and another claim was also afterwards set up to them by the trustees named in a deed of assignment made by Hoppe for the benefit of his creditors. A fiat in bankruptcy was subsequently sued out against Hoppe, and the goods were claimed also by his assignees. On the 1st November, 1841, the plaintiffs commenced this action of trover against the defendants for the recovery of the goods. The defendants' attorney wrote to the assignees, informing them of the action, and desiring to know whether they intended to maintain their claim, as the defendants meant to make an application under the Interpleader Act. The attorney of the assignees replied, that they should not persist in their claim to the goods. On the 16th December, an order was made by *Alderson B.*, "that unless cause be shewn to the contrary on a day therein named, the assignees of Hoppe be barred their claim to the goods in question, and that they pay to the plaintiffs the costs of this application; that the defendants deliver up the goods claimed to the plaintiffs, and pay their costs of the action, which shall be finally stayed, and that the assignees do pay to the defendants their costs of the action, and of this application, and repay to them the plaintiffs' costs of the action." On the day named in the order, the attorney

The assignees of a bankrupt, to whom certain goods were consigned, having set up a claim to the goods in the hands of the defendants, the carriers, the defendants applied to a judge under the first section of the Interpleader Act, and obtained an order, that unless cause were shewn to the contrary on a day named, the assignees should be barred their claim, and pay the defendants' costs. The assignees attended on the day named, and objected to the payment of the costs by them; and the order was discharged. Several summonses were subsequently served, calling on the plaintiffs (the vendors) and the assignees to state the nature and particulars of their respective claims. The assignees did not attend on any of these summonses:—*Held*, that the Judge had no

jurisdiction under the act to order the assignees to pay costs.

(a) This case was determined in Easter Term (April 17).

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of the assignees attended before *Rolfe*, B., and opposed the order being made absolute, and the learned judge discharged it, on the ground that the summonses on which it was drawn up were not made returnable on two successive days. On the 18th of December, the defendants took out another summons, calling on the plaintiffs and the assignees to shew cause why they should not appear and state the nature of their respective claims to the goods. On the return of this summons a second issued, and two other summonses in similar terms were subsequently taken out, and served on the assignees, to none of which they appeared. On the 23rd of December, the following order was made by *Gurney*, B.:—"I do order, that the claim of the assignees of Charles Hoppe, a bankrupt, be barred to the goods in the hands of the defendants, the subject of this action: and I further order, that this action be discontinued on payment by the defendants of the plaintiffs' costs, and delivery up of the said goods, on payment of the carriage: and I do further order, that the said assignees repay the defendants the costs so paid by them to the plaintiffs, and also the defendants' costs."

In Easter Term, *Kelly*, on behalf of the assignees, obtained a rule calling upon the defendants to shew cause why so much of the order of *Gurney*, B., as required the assignees to pay costs should not be rescinded, contending that the learned judge, under the circumstances of this case, had no jurisdiction under the statute to direct the payment of those costs:—citing *Lambert v. Cooper* (a).

Martin shewed cause.—The assignees having appeared upon the order nisi, that must be taken as an appearance for all purposes necessary to bring them within the jurisdiction of the judge under the statute. It is not essential, in order to subject a claimant, appearing before the judge,

(a) 5 Dowl. P. C. 547.

to his jurisdiction as to costs, that the party should then maintain or relinquish his claim. Suppose he appeared, and requested that the summons might stand over to a future day, would not that be sufficient to give the judge jurisdiction to award costs against him? Any suggestion of the party, made to induce the judge either to act or refrain from acting with respect to the matter brought before him, ought to be sufficient for that purpose. The first section of the statute expressly empowers the Court or the judge to "make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable."

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Kelly, contra.—The order nisi was not an order within the terms of the Interpleader Act, and the appearance of the assignees on that order, for the mere purpose of protecting themselves from the payment of costs, cannot be deemed sufficient to bring them within the jurisdiction given by the act. An order has here been made upon them to pay costs in a proceeding to which they were no parties.—He was then stopped by the Court.

PARKER, B.—This rule must be absolute. It is admitted there was no appearance upon the summons on which the order of my brother *Gurney* was made. Then with respect to the appearance on the order nisi, that was not an appearance within the meaning of the statute. Where the party appears to litigate his claim, that gives the judge jurisdiction as to costs, but here there has been no such appearance; the assignees appeared merely to object to the irregularity of the proceedings.

ALDERSON, B.—It is quite clear that there has been no appearance upon the summons on which this order was made. The ground on which the order proceeds is, that the case is one falling within the third section of the act;

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but the assignees never attended the summons, which is the only foundation of the order. I am not quite prepared to say there was not an appearance within the statute before my brother *Rolfe*; but I quite agree that the rule laid down by my brother *Parke* is the proper rule to guide the discretion of the Court; namely, that an appearance merely to object to the irregularity of the proceedings ought not to subject the parties to costs.

ROLFE, B., concurred.

Rule absolute.

June 9.

CARR v. ADAMS.

The plaintiff, having been employed by the defendant to do certain work for him, employed C. to assist him in doing the work, upon the terms that when the plaintiff earned £1, C. was to have 8s. and the plaintiff 12s., and which sum C. was to be paid whether the plaintiff was paid or not, and for which he swore that he looked only to the plaintiff for payment:—*Held*, in an action brought by the plaintiff to recover the price of the work, that C. was rendered a competent witness for the plaintiff, by indorsing his name on the record under 3 & 4 Will. 4, c. 42, s. 26.

ASSUMPSIT for work and labour, and on an account stated. Plea, non assumpsit.

The cause was tried before the under-sheriff of Middlesex, when the plaintiff, in order to prove his demand, called a person named Cocking, who, upon being examined on the voir dire, stated that he was employed by the plaintiff to assist him in doing the work in question, upon the following terms, viz., "that when the plaintiff earned £1, he, the witness, was to have 8s. and the plaintiff 12s.; that he expected to be paid whether the plaintiff was paid or not; and that he looked only to him for payment, and had nothing to do with the defendant." Upon this it was objected for the defendant, that the witness was incompetent; and the plaintiff, in order to restore his competency, proposed that his name should be indorsed on the record under 3 & 4 Will. 4, c. 42, s. 26. The defendant, however, insisted that this would not restore his competency, and the under-sheriff, being of that opinion, nonsuited the plaintiff. A rule nisi for a new trial having been obtained, it was argued in the last term by *Chadwick Jones* for the plaintiff, and *O'Malley* for the defendant. The Court, being of opinion that the witness was interested, discharged the rule, without adverting to the proposal for

indorsing his name upon the record. In consequence, however, of this having been suggested to the Court, they stayed the rule, and desired that the case should be re-argued on this point. Accordingly,

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O'Malley now shewed cause.—It is conceded, that if the witness's right to recover depended upon the verdict and the record alone, the indorsing of his name upon the record would make him a competent witness; but putting the record out of the question, the verdict for the plaintiff would itself advance his interests. He was to have 8s. out of every 20s. that the plaintiff received, and the amount so received would be capable of proof without the record. He had a direct interest in increasing the amount; and the plaintiff would be prevented from saying that he had not recovered that amount. The witness would in fact be a partner in the amount recovered, and entitled to two-fifths of it. But even if he were not, his evidence tends to place him in a better situation, for if the money be recovered, and gets into the plaintiff's pocket, he will be better able to pay the witness. [*Alderson*, B.—The law does not presume that a debtor has not sufficient assets to discharge his debts. The interest, to render a witness incompetent, must be certain, and not merely conjectural: *Paull v. Brown* (a).] This was a common fund, in which both were interested. It is not the less a partnership, because one is to receive more than the other. In the case of a residuary legatee, he is held to be interested, because the result of the action in favour of the executor necessarily tends to increase the fund out of which he is to take what is not wanted to satisfy the debts and legacies. So, the witness has here a certain interest in increasing the fund. [Lord Abinger, C. B.—That depends upon the verdict being admissible. If that be out of the question, he has no other means of proving it.]

(a) 6 Esp. 34.

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Chadwick Jones, in support of the rule, was stopped by the Court.

LORD ABINGER, C. B.—This case has been argued on a misapprehension of what the witness said. He said he was entitled to be paid, “whether the plaintiff was paid or not;” he has therefore no interest in the sum recovered. The verdict, however, might be evidence to shew what the plaintiff got; and consequently the witness would be incompetent, unless his name were indorsed on the record; but when that is done, the objection is cured.

ALDERSON, B.—The only interest the witness could have is, that the verdict would be evidence to prove the amount he would be entitled to claim; but as the indorsement on the record will prevent that, he can have no interest afterwards.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

June 13.

WARWICK v. C. RICHARDSON.

A testator devised his real and personal estate to D.

THE following case was sent by the Master of the Rolls for the opinion of this Court:—

and R., upon trust to sell, and to invest the sum of £10,000, arising therefrom, in the public funds or real securities, for the benefit of certain persons mentioned in the will. The money was not so invested, but with D.’s consent was received by R., and used by him in his private trade; and R. gave to D. a bond, conditioned to keep him harmless and indemnified against all actions, suits, proceedings, claims, demands, loss, costs, charges, damages, and expenses, on account of the said sum of £10,000, or by reason of R.’s being permitted to hold the same:—*Held*, that this bond was valid in law.

The legatees having filed a bill in Chancery against the trustees and their representatives, claiming payment of the £10,000 and interest, obtained a decree whereby it was declared that D. and R. were jointly and severally liable to pay that sum; and the legatees carried in a claim against D.’s estate for that amount, but no money was received therefrom:—*Held*, that the representatives of D. were entitled to recover from R., in an action on the bond, the whole amount of £10,000, and interest, and that their claim was not limited to the amount of costs actually incurred and paid by them in the Chancery suit.

John Pollard, by his will, dated the 10th of March, 1810, devised his real and personal estate to the use of Ralph Day and John Dingely Richardson, their heirs, executors, &c., upon trust to sell the same, and from the monies arising therefrom, that they should stand possessed of the sum of £10,000, and invest the same in the purchase of stock in the public funds, or in real securities, upon trust to pay the annual proceeds thereof to Susan Cooper and Joseph Yates Cooper, her husband, for their respective lives, and after their deaths, to their children. By a codicil, J. Y. Cooper was appointed an executor jointly with R. Day and J. D. Richardson. The testator J. Pollard died in 1817, and in the same year J. D. Richardson and R. Day alone proved the will, and acted under the same. They did not invest the sum of £10,000 in the purchase of stock in the public funds, or in real securities, but the whole was, with the consent of R. Day, received by J. D. Richardson, and used by him in his private trade. In 1818 Cooper and Richardson gave to Ralph Day a joint and several bond. In this bond it was recited, that J. Y. Cooper and Susan his wife, and Richardson, had requested Day to permit Richardson to employ the sum of £10,000 in his trade, according to an arrangement made between them; and that Day had consented thereto, on being indemnified in respect of such sum, and that such sum had been accordingly taken by and was then in the hands of Richardson. The condition was, that if Cooper and Richardson, or either of them, their heirs, executors, &c., "should at all times thereafter save, defend, keep harmless and indemnified the said R. Day, his heirs, executors, &c., against all manner of actions, suits, causes of action and suit, proceedings, claims, demands, loss, costs, charges, damages and expenses whatsoever, which should be brought, commenced, prosecuted, or made against them, or which they should bear, pay, suffer, sustain, expend, or be put to, on account of the said sum of £10,000, or by reason of

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Richardson being permitted to hold the same, then the obligation should be void, otherwise to remain in full force and virtue." Day died in 1818, having appointed T. Seddon his executor. Cooper died in 1833, leaving his wife and three children him surviving. Richardson died in 1833, and administration of his estate was granted to the present defendant. The sum of £10,000 was never invested, and remained due and unaccounted for by Richardson at the time of his death. In 1833, two of the children of Cooper filed a bill in Chancery against Christopher Richardson and T. Seddon and others, claiming payment of the sum of £10,000, with interest, and a decree was obtained in 1836, whereby it was declared that J. R. Richardson and R. Day became jointly and severally liable to pay that sum. The plaintiffs in that suit have carried in, against the estate of Day, a claim to the sum of £10,000 and interest. No payment has been made out of the estate of R. Day, on account of the sum of £10,000.

It is admitted that Seddon has been put to costs in the suit of *Cooper v. Richardson*, and paid £10 on account of such costs, out of the assets of Day. Seddon claims to be a creditor to the estate of Richardson, under the bond of 1818.

The question for the opinion of the Court is, whether Seddon, as the surviving executor of R. Day, is entitled to recover any and what sum of money under and by virtue of the said bond, from the personal representative of J. D. Richardson, to be paid out of his assets.

The point to be contended for by T. Seddon was, that he was entitled, as executor of Day, to recover under the bond, from the personal estate of J. D. Richardson, the sum of £10,000, with interest from the day of his death.

The defendant's points were, first, that the bond was void in law, and that Seddon was not entitled to recover anything from the representative of Richardson. Secondly,

that Seddon, if entitled to recover anything, could only recover the sum of £10, paid by him out of the assets of Day for costs in the suit.

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The case was argued on the 30th of May, by

W. H. Watson, for the plaintiff.—The plaintiff is entitled to recover the whole sum of £10,000 upon this bond. This was a case where a sum of £10,000 was appropriated to meet a specific legacy, but was lent to or retained by the executor Richardson, and used by him in his trade, with the assent of his co-executor, instead of being invested in real securities, pursuant to the trusts of the will. There was no person to invest it in real securities, except Richardson or Cooper, and Day, the obligors and obligee of this bond, which seems to have been given for the express purpose of giving a right of action at law. It is said the bond is void, because this application of the money was a breach of trust. But the obligor cannot come into court to say that. This is no question of public policy, but altogether a matter of private interest. There is nothing in the common or statute law to render such a bond void. Then, as to the amount to be recovered, it is clear that at law the judgment would be for the whole penalty. It will be said that the plaintiff can only recover the actual damages sustained and paid; even if that be so, yet the judgment must be to recover £20,000, and to levy only £10: *Wilde v. Clarkson* (a), *Judd v. Evans* (b). But it is to be observed, that here the condition is “to save, defend, keep harmless and indemnified the said R. Day, his heirs, executors, &c., against all manner of actions, suits, causes of action and suit, proceedings, *claims, demands*, loss, costs, charges, damages, and expenses whatsoever, which should be brought, &c., or made against them, or which they should bear, &c., on account of the said sum of £10,000, or by reason of Rich-

(a) 6 T. R. 303.

(b) *Id.* 399.

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ardson being permitted to hold the same." It is not necessary, therefore, in order to constitute a breach of the condition, that a suit should have been commenced: the obligors are to interpose and save the parties harmless against every claim and demand whatsoever. The words of the condition have a different and stronger meaning than merely to indemnify against damages actually sustained. The parties clearly intended present payment, on demand, of the whole £10,000, in order to its being invested pursuant to the will. In Com. Dig. Condition, (I.), it is laid down that "a condition to indemnify against A. is broken by his threatening to beat the obligee, by reason of which he dares not go about his business." There no damage whatever is incurred, but merely an apprehension of injury. So, "If a condition be to save harmless from an obligation in which he is bound to A., the obligor ought to discharge it by release or otherwise. So, if it be to save harmless *from all suits and demands* concerning that obligation." "So, if the obligation be forfeited, whereby he is *liable to be sued: à fortiori* if he be sued, although the obligation be satisfied before execution." [*Alderson, B.*—To restore a party to his former state, after suffering him to receive harm, is not to *save him harmless. Rolfe, B.*—Does not the argument seem to go to this, that *eo instanti* that the bond was executed, the obligors were liable?] No; but as soon as a demand was made for the investment of the money by the representatives of the obligee. *Abbots v. Johnson (a), Broughton's case (b), Barkly v. Kempstow (c)*, are all authorities to shew that the danger of being sued is a damnification, and a breach of the condition of such a bond as this, without actual suit or payment. It may be said, that Cooper, or the executors of Richardson, may pay the rest of the £10,000 to the parties entitled under the will; but it was, by the terms of the bond, to be paid to

(a) 3 Bulstr. 233.

(b) 5 Rep. 24.

(c) Cro. Eliz. 123.

Day, that he and Richardson conjointly might invest it in real security. The statute 8 & 9 Will. 3, c. 11, s. 8, will not affect this case; because, on the suit being instituted against Day's executor, there was an entire breach of the condition, and the whole damages were recoverable then or not at all. The statute applies only where there is a succession of breaches. *Lethbridge v. Mytton* (a) is an authority strongly in favour of the plaintiff. There the defendant, by his marriage settlement, conveyed estates upon certain trusts, and covenanted with the trustees to pay off incumbrances on the estates, to the amount of £19,000, within a year; and it was held, that on his failing to do so, the trustees were entitled to recover the whole £19,000 in an action of covenant, though no special damage was laid or proved. That was a strong case, because it was not a covenant to pay to the covenantees, and it could not be said that they were at all damnified. But *Parke, J.*, says—"At law the trustees were entitled to have this estate unincumbered at the end of a year from the marriage: how could that be enforced, unless they could recover the whole amount of the incumbrances in an action on the covenant?" So here, immediately on suit or demand, the whole damages are recoverable, in order that the money may be invested. *Carr v. Roberts* (b) is a still stronger case. There, by indenture reciting that the defendant had agreed to pay off certain mortgages and debts of J. W., he covenanted to save, protect, defend, keep harmless, and indemnify J. W., his heirs, &c. from the payment of the said debts, and from all actions, suits, claims, or demands on account of them: and it was held that this amounted to a covenant not only to indemnify, but to pay the debt. *Parke, J.*, in the course of the argument, adverts to the distinction between *indemnifying* and *saving harmless*. *Lamb v. Vice* (c) is an

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(a) 2 B. & Adol. 772. (b) 5 B. & Adol. 78; 2 Nev. & M. 42.

(c) 6 M. & W. 467.

Exch. of Pleas, authority to the same effect, and shews that the Court will
 1842. look at the object and intention of the bond. [*Alderson*,
 . *WARWICK* B., referred to *Penley v. Watts (a)*.] Day would be bound,
 v. in order to save himself from all harm, to invest the
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 save him from all harm must enable him to do that.

J. L. Adolphus, contra.—First, this bond is void, the condition of it being against law, because in fraud of the trust under which the parties to it were acting. It is a bond, not to secure the estate, but for the private indemnity of Day against any inconvenience he may from time to time incur by conniving at the misappropriation of the money by Richardson. It is absurd to say the intention was to enable Day to have back the money in order to invest it. If so, the bond must be forfeited instantler, or the transaction be rescinded at once. Suppose Richardson had died insolvent, Day would have come in as a specialty creditor on his estate, ranking before the cestuis que trust. The effect of the bond, therefore, would be to postpone them, who might otherwise have come at once upon Richardson's estate, to Day. And supposing Day's estate to be liable to other creditors, they would come in *pari passu* with the cestuis que trust. The bond was therefore a fraud upon the trust, as well in intention as in effect. Even where trustees are empowered to lend money on personal security, one of them cannot be a borrower: — *v. Walker (b)*, *Brice v. Stokes (c)*. This bond was given expressly that Day might not perform the duty imposed upon him by the will, and is therefore void. [*Alderson*, B.—You are making a court of law the judge of a matter which is for the cognizance of a court of equity. How can we tell that a court of equity would hold it a breach of trust? What violation is there of the common

(a) 7 M. & W. 601.

(b) 5 Russ. 7.

(c) 11 Ves. 319.

or statute law?] The Court will not refuse to take notice of plain points of equity. Courts of law take notice of trusts for some purposes. At all events, the Court will take cognizance of what these parties were bound to do as executors. In *Shep. Touch.* 371, it is said, "When the thing enjoined or restrained, to be or not to be done by the condition, is such a thing in its own nature as that the commission or omission thereof is *malum in se*, then not only the condition, but the whole obligation also, is void *ab initio*." And in another place, (*Id.* 132), "If the matter of the condition tend to provoke or further the doing of some unlawful act, or to restrain or forbid a man the doing of his duty, the condition for the most part is void." A similar rule is laid down by *Parker, C. J.*, in *Mitchel v. Reynolds* (a). The performance of this trust was a *duty* within the meaning of those authorities, and the bond was void for the violation of it. In the case of bonds to provide a settlement on the separation of husband and wife, no *public policy* intervenes, and yet they are void. So in the case of a security to one creditor for a greater proportion than his share of a composition, which is also void: *Cockshott v. Bennett* (b). [*Alderson, B.*—There it is in the nature of a distinct fraud.] So is this transaction, in the sense in which the word is there used. It is a collusion between two parties, to break their faith towards the persons for whose benefit they have undertaken the office of trustees. It is not a fraud in the sense of *deceit*, but a fraud in law, as being a private agreement tending to a breach of their fiduciary duty. That duty is, to take immediate steps to have the fund invested: *Jackman v. Mitchell* (c). In *Waldo v. Martin* (d), an agreement was held void merely as being wrongful against a third party. There are many authorities to shew that a party cannot recover against another upon an indemnity against the

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(a) 1 P. Wms. 181. (b) 2 T. R. 763. (c) 13 Ves. 581.

(d) 4 B. & Cr. 319; 6 D. & R. 364.

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consequences of their jointly doing an unlawful act, although it do not amount to a criminal offence: *Shackell v. Rosier*(a), *Colburn v. Patmore*(b), *Merryweather v. Nixan*(c), *Prole v. Wiggins*(d).

The second question is, what sum the plaintiff is entitled to recover against the estate of Richardson, supposing the bond valid. That ought to be confined to the £10, the amount of the actual damage. The terms of the bond are all prospective, and import a continuing guarantee against successive damnifications. According to the argument on the other side, the bond was broken instanter, and the words of the condition are nugatory. The obligors could not have meant to stand accountable for the whole £10,000 instanter, but only to cover future damage actually sustained. If all that was contemplated was to compel the investment of the fund, the words of the condition are altogether inapplicable. They all point to a continuing guarantee against any damage as it arises. The cases cited on the other side are distinguishable. *Broughton's case* was the case of a counter-bond, which was clearly forfeited. *Abbots v. Johnson* is a like case. The authorities cited from Com. Dig. are not disputed; nor is it denied that here there has been a forfeiture of the bond to some extent. But it is not clear that Day's estate will pay, or be in danger of paying, anything beyond the £10; all may be paid from Richardson's estate. Day's executor is fully indemnified, if the £10,000 be forthcoming, and his costs are paid. *Lethbridge v. Mytton* was the case of an absolute covenant to invest a certain sum of money in the year. [*Alderson, B.*—Here the decree makes Seddon liable to invest the £10,000.] It is merely declaratory on that point, for the instruction

(a) 2 Bing. N. C. 634; 3 Scott,
59.

(b) 1 C., M. & R. 83.

(c) 8 T. R. 186.

(d) 3 Bing. N. C. 230; 3 Scott,
607.

of the Master. [*Alderson*, B.—He is charged with a debt of £10,000; how do you save him harmless but by paying that debt?] The *possibility* that he may have to pay it is not a damage. It is for the plaintiff to shew the amount of damage. In *Carr v. Roberts*, the party undertook not merely to *indemnify*, but to *pay*. The distinction between a contract to pay and indemnify, and to indemnify merely, is shewn in *Penny v. Foy* (a), and *Collinge v. Heywood* (b). —He cited also *Sparkes v. Martindale* (c), and *Young v. Taylor* (d).

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Watson was heard in reply.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—In this case we shall certify our opinion to the Master of the Rolls, that Thomas Seddon, as surviving executor of Ralph Day, is entitled, under the bond executed by John Dingley Richardson, to prove for the full sum of £10,000, together with interest, and the costs which he has incurred in the Chancery suit in which the decree has been made.

We propose now to assign shortly our reasons for so doing.

The bond in question is dated the 28th of May, 1818, and by it Joseph Yates Cooper and John Dingley Richardson, and their representatives, became bound in the penal sum of £20,000 to Ralph Day and his representatives. The condition of the bond, after reciting the will of John Pollard, by which, among other bequests, he left to Ralph Day and John Dingley Richardson £10,000, in trust for his the testator's daughter, Mrs. Cooper, and her children,

(a) 8 B. & Cr. 11.

(c) 8 East, 593.

(b) 9 Ad. & E. 633; 1 P. &

(d) 8 Taunt. 315.

D. 502.

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proceeded to state, that that sum had been accordingly raised, and was in the hands of John Dingley Richardson ; that Mr. and Mrs. Cooper had agreed with John Dingley Richardson that he should hold and employ it in his business, and that Ralph Day, the co-trustee, had consented thereto, on being indemnified. And then it was provided, that if they, Mr. Cooper and John Dingley Richardson, and their representatives, should from time to time and at all times thereafter well and truly save, defend, keep harmless and indemnified the said Ralph Day, his heirs, &c., from all actions, suits, causes of action and suit, proceedings, claims, demands, loss, costs, charges, and expenses whatsoever, which might arise for or by reason of the said legacy of £10,000, or any part thereof, or the interest thereof, or by reason of John Dingley Richardson being permitted to hold the same, the obligation should be void.

In consequence of this legacy having been thus dealt with by the two trustees, the children of Mr. and Mrs. Cooper filed their bill against the representatives of the trustees, (who are both dead), and in the decree in that suit a declaration has been made that the trustees are jointly and severally liable to make good the legacy, with interest at the rate of 4 per cent. A charge has been since carried in against the estate of Ralph Day, but no sum has as yet been paid out of his funds. The case however states, that the representative of Ralph Day has incurred costs in the course of that suit.

The question now is, whether he has a claim against the estate of Richardson under this bond ; and if so, to what amount.

Two points were made in the argument—First, it was contended that the bond was void, as being a bond of indemnity against a breach of trust, and that the case therefore fell within the rule, that it is illegal to indemnify a party for doing a wrong.

But we think that objection is not well founded. All that appears on the face of this case is, that Richardson was to be allowed to hold the money, upon giving this bond of indemnity. It is true that, for certain reasons peculiar to a court of equity, the estate of a trustee, who suffers trust-money so to remain, is held to be liable to make good any eventual loss: but that is all. There is nothing to shew us, sitting in a court of law, that there is anything necessarily illegal or wrong in the conduct of a trustee who has been a party to such an arrangement. Indeed, many cases might easily be put, which would exonerate him from blame altogether. The whole circumstances of the case must be looked at in a court of equity, before any opinion can properly be formed on the subject; and we have no means of judging of them. This objection therefore fails, and the question is reduced to the consideration of the proper amount of damages.

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Now, as to this point, the case may be shortly thus stated:—A. has agreed to save harmless his co-trustee, B., from any claim which may arise out of B.'s permitting him to hold and use a legacy of £10,000, instead of investing it in a particular way, as they were directed to do by the will under which they became trustees. In consequence of this, a claim is afterwards made by the cestuis que trust against him, the result of which is, that B. is ordered to invest £10,000, with interest at 4 per cent., and is forced to incur costs in the discussion of that suit. Now, what ought A. to have done, in order to save B. harmless from this claim? Manifestly he ought to have invested £10,000; and not having done so, ought now to pay that sum to B., and also to repay those costs and that interest which B. is now obliged to pay. We think, therefore, that this is the proper amount of the damages to which A. is liable under the bond. For this will indemnify B. against the payments to which he has been rendered liable in consequence

Exch. of Pleas, of A. not having saved him harmless, by investing the sum
 1842. of £10,000 as he ought to have done.

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The cases cited in argument are all distinguishable from the present. The breach of the bond, in them, consisted in not indemnifying against a payment, and none therefore took place till a payment was made, and the amount depended upon and was measured by the amount of such payment alone. Here, the breach of the bond is not saving Ralph Day and his representative harmless against the claim of the children of Mr. and Mrs. Cooper, and the proper amount of damages is therefore that amount to which the making of the claim subjects him, which is here the sum to be invested, and the actual loss which has been subsequently added to that sum, in consequence of the claim having been enforced by law upon the party to be indemnified.

These are the reasons upon which our certificate is founded.

A certificate was sent accordingly.

June 9.

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On an issue to try the property in certain goods, which the plaintiff claimed under a bill of sale, a former bill of sale of the same goods, but which had been cancelled, was tendered in evidence to shew that the second bill of sale was given bona fide, and not fraudulently. This document having been rejected at the trial, on the ground that it was not stamped:—*Held*, that it was properly rejected, and was inadmissible without a stamp.

THIS was an issue under the Interpleader Act, to try whether certain goods, which had been seized by the sheriff of Cardiganshire under a writ of *fi. fa.*, were the property of the plaintiff or of one Thomas Davies, against whom that writ issued. The cause was tried before *Maule, J.*, at the last Cardigan assizes, when the plaintiff

was tendered in evidence to shew that the second bill of sale was given bona fide, and not fraudulently. This document having been rejected at the trial, on the ground that it was not stamped:—*Held*, that it was properly rejected, and was inadmissible without a stamp.

claimed to be entitled to the goods by virtue of a bill of sale, dated the 2nd of January, 1840, which purported to be a conveyance of them to him by one Davies, his brother-in-law, as a security for the repayment of £300 and interest, which was therein stated to have been advanced at different times by the plaintiff to Davies. The defendant alleged that the transaction was a fraudulent one; and the plaintiff, in order to shew that it was not, proposed to give in evidence a former assignment of the same goods, prepared by a scrivener, and executed by Davies on the 18th of October, 1839, as a security for the sum of £180, being a portion of the £300 which had been then advanced, on which the word "cancelled" was written. This assignment was not stamped, and its admissibility was objected to on that ground. The learned judge refused to admit it, and a verdict was found for the defendant. In Easter Term, *E. V. Williams* obtained a rule to shew cause why there should not be a new trial, on the ground of the rejection of this evidence: against which

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Chilton now shewed cause.—The plaintiff contends for a strange proposition, that he is first to put in an assignment on which in itself he cannot rely, and then that he may put in an unstamped instrument to make it available. It was held in *Sweeting v. Halse* (a), that a jury ought not to be permitted to draw a conclusion of fact from an unstamped instrument. It is said on the other side, that as the first assignment was cancelled, the plaintiff does not seek to give effect to it, but to use it merely to shew what the parties meant; but he does seek to give effect to it, when he uses it to shew what the parties intended at the time. There would be extreme danger in sanctioning the admission of such evidence; it would afford to a dishonest person

(a) 9 B. & C. 365; 4 Man. & R. 287.

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great facility in defeating justice. A party who relies upon an instrument is bound to put it in, and he cannot do so unless it be properly stamped; and as to the hardship which it is said will occur if this instrument be excluded, when used merely to shew bona fides, the same occurs in every case of an unstamped contract. [Lord Abinger, C. B.—The assignment was offered in evidence to shew that the parties had come to an agreement of some kind; if that agreement had been by parol, it might have been proved, but as it was reduced into writing, it ought to have been stamped. In cases where a party seeks to shew some criminal offence, where you treat it not as the instrument it purports to be, it is otherwise.] Where an instrument which requires a stamp is allowed to be given in evidence without one, it is upon the principle that no stamp would give it validity; thus in the case of a forged bill of exchange, the document is not what it purports to be, and a stamp would not render it available. In *Dover v. Maestaer* (a), it was held that a note given by a voter who had been bribed, for repayment of the sum given to him in order to secure his vote, might be given in evidence in an action of debt for the bribery, though not stamped, to prove the fact of bribery. There the paper was in form a promissory note, but in fact it was nothing of the kind, and never intended to be so. So it has been held, that an illegal policy of insurance on lottery tickets may be read in evidence without being stamped: *Holland v. Duffin* (b). That, again, was because it was illegal, and no stamp imposed upon it would give it validity. And in *Nash v. Duncomb* (c), where the defence to an action on a promissory note for money lent was that the loan was usurious, it was held that an unstamped agreement as to the terms on which the note was given, might be given in evidence without a stamp. If a party

(a) 5 Esp. 92.

(b) Peake, N. P. C. 58.

(c) 1 Moo. & Rob. 104.

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produces an instrument, relying on its illegality, and to destroy its effect, it is admissible for that purpose; but even in criminal cases, if the instrument is treated as good, it cannot be read. An instance is given in *Starkie on Evidence (a)*, where, upon an indictment against a clerk for embezzling his master's money, *Bayley, J.*, held that an unstamped receipt given by the servant to the debtor who paid him the money, was not evidence against the prisoner. And in *Rex v. Gillson (b)*, upon an indictment for arson with intent to defraud an insurance office, an unstamped memorandum indorsed on the policy was held not to be admissible by the judges, upon a case reserved for their opinion. Lord *Tenterden*, in delivering the judgment of the Court in *Jardine v. Payne (c)*, says, "We are of opinion, however, that an unstamped bill, or one improperly stamped, cannot be read to the jury as evidence of the contract, or any part of it, in respect of which the plaintiff sues. Such an instrument may be looked at by the Court for the purpose of seeing whether it requires a stamp, or is properly stamped, that being a part of the duty of the judges, with which the jury have nothing to do, and of which they are supposed to take no cognizance. It may be looked at by the jury also for a collateral object, as was done in the case of *Gregory v. Frazer (d)*, where the defence was, that the maker of a note was drunk at the time the money was advanced, and was imposed upon by the plaintiffs, and the handwriting of the note was vouched as proof of that fact." That is an authority directly in point, for there the Court refused to lay before the jury a bill improperly stamped, for the purpose of ascertaining the amount referred to in a distinct acknowledgment of the debt. That case is decisive of the present. [*Alderson, B.*—The statute says that the instrument "shall not be pleaded or given in evidence

(a) Vol. 2, p. 772, 2nd edit.

(b) 1 Taunt. 95.

(c) 1 B. & Adol. 670.

(d) 3 Camp. 454.

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in any court, or admitted in any court to be good, useful, or available in law or equity." That means a pleading, or giving in evidence by a party to a suit. In criminal cases, however, the crown is not a party to a suit; nor can it be said to avail itself of the instrument, or make it good or useful. The question is, can it be received at all as evidence, where the object is to make it beneficial or available to the party producing it?] A cancelled instrument cannot be different from an instrument *functum officio*; and in the case of indentures of apprenticeship, it has been held that they cannot be received in evidence without a stamp, after the expiration of the apprenticeship (a). [*Alderson, B.*—In *Rex v. Inhabitants of Pendleton* (b), the Court did look at an unstamped instrument to see if the term had expired, but that was only for the purpose of determining whether parol evidence was receivable to prove the yearly service after the term expired.] The Court were there acting in accordance with the rule laid down in *Sweeting v. Halse* and *Reed v. Deere* (c), that the Court can look at an unstamped document, in order to ascertain the admissibility of other testimony, and also that it may be used where a witness looks at it merely for the purpose of refreshing his memory. [*Alderson, B.*—*Gregory v. Frazer* is also distinguishable on another ground; the action was for money lent, and under the old general issue the plaintiff would have been defeated upon proving that a promissory note had been given; then he produced it to shew that no such instrument was given, which was a collateral purpose.] *Coppock v. Bower* (d) was also a case where the instrument was held admissible for the purpose of insisting on the illegality of the transaction; but here the plaintiff wanted the agreement to be put in, to shew that it had been once valid.

(a) *Rex v. Inhabitants of St. Paul, Bedford*, 6 T. R. 452.
(b) 15 East, 440.

(c) 7 B. & Cr. 261.
(d) 4 M. & W. 361.

E. V. Williams and Nicholl, in support of the rule.—The rules of evidence are precisely the same, whether they are applied to civil or criminal cases. A conspiracy was here imputed to the plaintiff and his brother-in-law Davies, and the question must be considered in the same light as if it had arisen upon an indictment for a conspiracy. Can it be contended that upon such a charge this evidence ought to have been rejected? The law does not admit unstamped instruments for the purpose of proving guilt only, but also for the purpose of demonstrating innocence. [Lord Abinger, C. B.—That is quite a different thing. Suppose the prosecutor proved fraud aliunde, could the party charged shew a valid contract by an unstamped instrument? Here you are setting up this instrument in order to give effect to it. Alderson, B.—You are contending, in effect, that the declarations of a prisoner are not only receivable against him, but also admissible for him; but that is not so.] Previously to the case of *Rex v. Hawkeswood* (a), some doubt existed whether unstamped documents could be received in evidence in criminal cases; but in that case it was held, that on an indictment for forging a bill of exchange, the bill may be given in evidence although it be not stamped. Lord Kenyon, indeed, in *Whitwell v. Dimsdale* (b), denied that case to be law, and held that an agreement not stamped could not be given in evidence for any purpose whatever, either to establish or defeat it. However, it appears from the note to that case, that he afterwards approved of the decision in *Hawkeswood's case*. In *Rex v. Pooley* (c), where that case was cited, the true ground of the exception is pointed out, viz. that such documents may be used for a collateral purpose. Here the purpose for which the document was attempted to be used

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(a) 1 Leach, C. C. 257.

(b) Peake, N. P. C. 167.

(c) 3 Bos. & Pul. 311.

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was collateral. It was to rebut the imputation that the second assignment was the result of a conspiracy to defeat the execution. It shewed that the assignment in January, 1840, was not the result of a conspiracy upon the pressure of the moment; but that on an occasion when the plaintiff was not in difficulties, he had executed another assignment for a debt previously due, and it was admissible for that purpose. As to *Gregory v. Frazer*, it has always been understood by the profession that the note was given in evidence by the defendant; and the observations of Lord *Ellenborough* lead to that conclusion. The mode in which the question arose was probably this: the defendant naturally inquired whether there was any memorandum of the loan, upon which the plaintiff produced the unstamped note; and thereupon the defendant proposed to read it, but the plaintiff objected to it. If it had not been objected to, the plaintiff might have given it in evidence to shew the loan of the money. In this case the charge is, that these parties have been guilty of a conspiracy. Suppose this had been an indictment for larceny, and the defence was that the plaintiff took these goods under a bonâ fide claim of right, could he not have given in evidence such a deed as this? and would it not have been admissible without a stamp? [*Alderson*, B.—Is not that a fallacy? The issue is not the same: in the one case the document is put in to shew that it is a valid instrument; in the other, that it is not.] Upon an indictment for a conspiracy, it is clear that such an unstamped instrument as this would have been good evidence for the prosecution: *Rex v. Fowle* (a). It is laid down by *Patteson*, J., in *Keable v. Payne* (b), that there is no distinction in this respect between a civil and a criminal proceeding. Then, if the Stamp Acts cannot be

(a) 4 Car. & Pay. 592.

(b) 8 Ad. & Ell. 559; 3 Nev. & P. 531.

used to screen fraud, may they not be used to prevent the innocent from acquitting themselves? If such an instrument be admissible to establish, it follows as a necessary consequence that it may be used to repel, a charge of fraud. [Lord *Abinger*, C. B.—There I differ with you *toto cœlo*. In the one case the party offers the instrument in evidence to demolish it; in the other, to support it. In *Rex v. Fowle* the object was not to set it up.] It does not appear that the document was put in evidence there to shew that it was not valid. In *Keable v. Payne, Littledale, J.*, says, “Although stat. 31 Geo. 3, c. 25, s. 10, uses the words ‘available in law or equity,’ yet these must be understood with some qualification, as indeed is admitted by the counsel who support the rule, in the cases of forgery and usury. They contend, however, that the evidence is receivable only where the instrument is the immediate subject of prosecution. But the question here being whether Mann committed the fraud, the act of Mann is admissible in evidence, though it consist in writing on unstamped paper.” And *Patteson, J.*, says, “Whether against the person accused of the fraud or a third party, the principle must be the same, if the question turn on the fact of fraud. If it were necessary in a civil action to shew that there had been a felony or an obtaining by false pretences, the evidence would be admissible as if the case were that of an indictment for the felony or fraud.” There the principle is extended to make an unstamped instrument admissible, though used to shew fraud in a third party. One would have thought that if the document were admissible to shew fraud, it would equally be admissible to shew no fraud. Here the plaintiff did not rely upon it, or set it up as a valid subsisting instrument, but merely sought to explain his procuring a fresh security, and to rebut this charge of fraud. It is equally an extension of the strict words of the act of Parliament, whether it be for the purpose of proving guilt or proving innocence.

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LORD ABINGER, C. B.—I must own that, in the early part of this discussion, I entertained a strong opinion upon the case; and although there is no one more likely than Mr. *Williams*, from his learning and acuteness, to shake that opinion, he has wholly failed to do so. It is difficult to deny many of the abstract propositions advanced by him, but if the particular circumstances of this case are looked at, nothing can be more clear. The Stamp Act, for the sake of the revenue, was intended to exclude the reception in evidence of such instruments as this, unless stamped, whenever they are introduced for the purpose of making them available; that is to say, of setting them up and giving effect to them. Therefore, in every case where a question arises between the parties in a cause as to the evidence which may be given,—for instance, in the case of an agreement, which is the subject of the action, or has some collateral relation to it, the moment you ask whether it is in writing, and it turns out to be so, no other evidence than the written document being producible, if it proves to be unstamped, it must be rejected. So with regard to promissory notes and bills of exchange, and all matters which are the subject of the Stamp Acts; unless they are stamped when they are produced, they must be rejected, wherever they are produced to shew that they have, or ever had, any validity. But the case is different when the purpose is not to give them effect, but to defeat them, and to shew that they were entered into for the purpose of fraud and conspiracy. Thus, if there were a conspiracy, and the parties intended, inter se, to take certain measures to gain an advantage from an agreement, although it be not stamped, it is received in evidence to shew a guilty mind. There it is used, not with a view to set it up, but to shew that it was absolutely void, and as evidence of a fraud, and of the guilty purpose in which the parties to it were engaged. So, if a man forges a bill of exchange, and puts it upon a wrong stamp, is it to be said that, because it is forged upon a wrong stamp,

the forgery cannot be established in a court of law? It would not be the less a fraud or forgery on that account, and to hold the document inadmissible would manifestly be a departure from the spirit and letter of the act of Parliament. The ground upon which it is admitted in such cases is, that it is not a valid instrument, but merely evidence of the fraud; and that the party may produce such an instrument, for the purpose of defeating it. The cases in the King's Bench, which were cited for the plaintiff, and in which I perfectly concur, were decided upon this principle, and so also was the case of *Coppock v. Bower* in this Court. There a party, having been charged with bribery before a committee, entered into a corrupt agreement to withdraw and give up his seat in Parliament, and give £500, the other party stipulating to support him upon his next attempt in the borough. That agreement was considered to be evidence in support of the plea, which set forth the corrupt agreement upon which the promissory note was given. It was adduced there, not to give effect to it, but to destroy the whole transaction, by shewing that the *res gestæ* were in themselves illegal and corrupt. So also, an agreement without a stamp is evidence in cases of usury, to prove the course of proceeding, and shew that the parties entered into a corrupt contract. But a party charged with usury could not give in evidence an unstamped agreement to rebut such a charge. In the former case he treats it as an unlawful and void instrument, in the other he seeks to set it up as available. An ingenious man might put a thousand cases in which it might be difficult to say it was not evidence. Suppose a man could explain away an offence by shewing that he acted under a mistake derived from a written instrument; to shew that, he offers it in evidence, not as a valuable and available instrument, and to establish a right, but only in order to rebut the accusation of a guilty mind. In such

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a case I do not conceive that the document could not have been given in evidence if unstamped, though there may be some doubt on that point; but Mr. *Williams's* object was not to establish such a case, or to shew that the instrument was void in law, but to use it as evidence of a binding contract between the parties, which they then meant to act upon, available, though not availing, and which, upon payment of the duty, would have become good. It was sought to establish the bona fides and the purity of their intention, and that they intended to do at that time what they did some months afterwards,—which in effect was to make the deed available. On the other hand, supposing that the defendant had taken upon himself the onus probandi, in the first instance, that the whole transaction was a fraud, I do not say that he might not have given this assignment in evidence, and shewn that it originated in a fraudulent conspiracy, and that it was merely colourable, being intended by and by to be used for the purpose it was used for before a jury; or that the parties were hatching up evidence from time to time, to be used only when the immediate necessity arose, and the time came for the fraud to be practised, and it was then done away with; it might, I think, be evidence of such a corrupt agreement, and to shew such a conspiracy. It was, therefore, an instrument which might be evidence for the party who sought to attack it, but not for a party whose object was to support it. In my opinion, an unstamped instrument cannot be received in evidence, wherever the party tenders it with a view to give any legal effect to it whatever.

ALDERSON, B.—I am clearly of the same opinion, that this instrument was inadmissible. I take the rule to be as his Lordship has laid it down, that when an instrument is produced in order to be set up as an agreement, and to

give effect to it as a contract, you cannot give it in evidence unless it has a stamp. Now here it was attempted to be set up, and to have effect given to it; that is to say, it was propounded as an instrument valid and effectual for the purpose of conveying the property mentioned in it at the time it was executed, and as having a capacity to be made available in law. I think, therefore, it was properly rejected. The only cases in which such an instrument is allowed to be given in evidence without a stamp are where it is used for the purpose of shewing that it never had any validity at all, but was merely colourable; and where the fact that the party has entered into an agreement which is illegal from the beginning, is a material fact in the case, as it was in *Coppock v. Bower*.

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GURNEY, B.—I quite agree with my brethren, for the reasons which they have given. Many imaginary cases of hardship, arising from the stamp laws, might be cited in support of the contrary view, but they cannot form any rule.

ROLFE, B.—I am of the same opinion. I think we may see very well what the real meaning of the legislature was, by looking at the words of the statute, which says, that no such bills of exchange or agreements, &c., shall be pleaded or given in evidence, or admitted in any court to be good, useful, or available in law or equity, unless stamped. Coupling the first branch with the last in that sentence, we must understand it to mean that it is not to be given in evidence to make it available in any court of law or equity. There may be collateral circumstances under which an unstamped instrument may be given in evidence, but it is difficult to define or lay down an abstract rule as to what is a collateral purpose. Here the object distinctly was to shew that there had been a

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valid and subsisting agreement at a previous period, and as it was unstamped, it was not receivable. It is desirable to guard ourselves against laying down any general rule, especially in criminal cases; but in the case put by Mr. *Williams*, I think no stamp would be necessary. He says, suppose a party indicted for larceny, might he not give in evidence an unstamped assignment to him of the goods? I think he might. There the allegation would be, that the accused took a particular chattel feloniously. You shew that he had executed something which he supposed gave him a right to take it, but you do not thus make the assignment available in law or equity. He merely took the chattel, thinking the deed gave him a right, when in truth it did not. So in a case of embezzlement, if the party accused had paid away the money on unstamped promissory notes, they would be evidence to shew the mistake under which he had paid it away.

Rule discharged.

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DALY v. THOMPSON, Secretary, &c., of the Anti-Dry-Rot Company (a).

CASE.—The declaration stated that theretofore, to wit, on the 27th December, 1838, the plaintiff became and was, and still is, entitled to divers, to wit, twenty shares in the undertaking mentioned in an act of Parliament, passed in the sixth year of the reign of his late Majesty King William the Fourth, intituled “An Act to enable John Howard Kyan to assign to a Company certain Letters Patent,” that is to say, twenty shares in the capital or joint-stock of the said company: that the said company had provided certain books for entering therein the names and designations of the

Case against the Secretary of the Anti-Dry-Rot Company, for not making out and delivering to the plaintiff a certificate in respect of each of 20 shares purchased by him. The act, 6 Will. 4, c. xxvi, provides that the capital shall be £250,000, and that the num-

ber of shares shall be limited to 10,000; and the 16th section enacts, that the company shall keep a book, and cause to be entered therein the name and designation of every person subscribing for shares in the undertaking, and of every person entitled to any shares therein, making a separate entry of each share in numerical order; and that after the making of such entry a certificate shall be made out in respect of every share, specifying the number of such share and the name of the proprietor thereof, and such certificate shall be delivered to the proprietor upon demand. And the twentieth section provides that it shall be lawful for the proprietor of every share to sell and transfer the same by writing duly stamped, which transfer shall be exhibited to the company, or their secretary, to be filed and registered in the manner prescribed by the act. At the trial, the plaintiff produced in evidence twenty scrip certificates payable to bearer, signed by three of the directors, and countersigned by one T., who had been secretary to the company. It appeared that T. had fraudulently re-issued a number of the shares, and this having become known, the shares, at the time the plaintiff purchased, were at a low discount. Notices had been given by the company in the public papers of the fraud which had been practised, and the broker who negotiated the sale of the shares to the plaintiff knew of that fraud at the time. It appeared that at the time the scrip certificates were brought by the plaintiff to be registered, the whole number of 10,000 shares had been already entered in the register, pursuant to the act. It was thereupon objected that the register being full, and the defendants having no power to add to the number of shares, the action in this form would not lie; and the learned Judge being of that opinion, nonsuited the plaintiff:—*Held*, that the nonsuit could not be supported; because the register might have been improperly filled, in which case the company would be taking advantage of their own wrong.

Semble, that it was not sufficient for the plaintiff merely to produce scrip certificates payable to bearer, which he had required to be registered, but that he ought to have shewn his *title* to have those shares registered, and to have deduced a good title from the original subscriber and his assignees.

It was also objected at the trial, that the plaintiff was not the *bonâ fide* holder of these shares, inasmuch as he had purchased them after notice that many shares were fabricated by a person who was himself a director and secretary of the company for a time, and that it might be that the plaintiff had acquired his title through some of those false certificates; and it was proved that the plaintiff had given a less price than the ordinary one; but *semble*, that that would not deprive him of the title he had by the transfer, unless it were shown that he was *not* the *bonâ fide* owner.

(a) This case occurred in Easter Term (April 25), but was postponed in the expectation that the case would be again tried, but as

no further step has been taken by the parties, the case is now published.

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by the 16th section of the act limited to the number of 10,000.

The plaintiff, at the trial, produced in evidence twenty scrip

share or shares in the said undertaking, and of every person entitled to any shares or share therein, making a separate entry of each share; and such share shall be numbered, beginning with No. 1, and proceeding in arithmetical progression whereof the common excess shall always be one, and every such share shall always be distinguished by the number so to be applied to the same; and after the making such entries, a certificate shall be made out in respect to every share in the said undertaking, specifying therein the proper number of such share, and the name and designation of the proprietor or proprietors thereof, and every such certificate shall be delivered to the proprietor of such share or shares, his executors, &c. upon demand, and might be in the words, or to the effect, set forth in page 14 of the act. And such certificate shall be admitted in all Courts whatsoever, as evidence of the title of such proprietor, his or her executors, administrators, and assigns, to the share therein specified, and to the profits and advantages accruing in respect of the same; but the want of such certificate shall not deprive any proprietor or proprietors of any share or shares in the said undertaking of his, her, or their right or interest in or claim to a due proportion of the profits and advantages of the said undertaking, nor hinder or prevent the proprietor or proprietors of any such shares from selling or disposing of any such share or

shares; and in case such certificate shall not be produced or forthcoming, then the said entry, or a true copy thereof certified by the secretary of the said company, shall be deemed *prima facie* evidence of the title thereto.

And it is further enacted by section 20, that it shall be lawful for the several and respective proprietors of any share or shares in the said undertaking, their executors, administrators, successors, and assigns, to sell and transfer, by writing duly stamped, any share or shares of which they shall respectively be possessed, and every such transfer may be in the form mentioned in such page. And every such transfer, executed by all the parties thereto, should be exhibited to the said company or their secretary, to be filed by the said secretary and kept for the use of the said company, and every such transfer shall be registered in the books of the said company, by an entry of the date of such registry and the date of such transfer, together with the names of the parties thereto, and number of the share or shares transferred; and a copy of such registry or entry signed by the secretary to the said company, shall be sufficient evidence of every such sale and transfer, and shall be received as such in all disputes and in all trials before any judges, justices, and others; provided always, that until such transfer shall be so entered or registered in the books of the said company, no purchaser or pur-

certificates, dated January, 1836, payable to bearer, signed by three of the directors, and countersigned by one Terry, who had been secretary and managing director to the company. It appeared, however, that Terry had fraudulently re-issued a great number of the shares which had been brought into the office; and this having become notorious, the shares, at the time the plaintiff purchased, were at a very low discount, and the shares he now claimed to be registered had been purchased at a low price. It appeared that the whole 10,000 shares had been disposed of, and entered in the register; that notices had been given by the company in several newspapers, and placed upon the Stock-Exchange, of the frauds practised with the shares, and cautioning persons not to purchase them; and that the broker who negotiated the sale of these shares to the plaintiff, knew at the time of the frauds which had been practised by Terry respecting the shares. It was objected for the defendants, that the action would not lie, inasmuch as the register was full, and the defendant had no right to add to the number of shares. On the other hand, it was said that the plaintiff ought not to be a sufferer by the frauds committed by the secretary of the company; and the scrip certificates being signed by three directors of the company, that the company were responsible for them. The

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chasers of any share or shares, his, her, or their executors, administrators, successors, or assigns, shall have any part or share in the said undertaking and the profits and advantages thereof, nor shall receive any interest or dividends for or in respect of such share or shares so purchased, nor be entitled to vote at any meeting or meetings as proprietor or proprietors of or in the said undertaking: provided also, and it is further enacted, that, after any call for money shall have been made by virtue of the said act, no person or persons shall sell

or transfer any share or shares which he, she, or they shall possess in the said undertaking, after the day appointed for the payment of the said call, until the money called for in respect of his, her, or their share or shares intended to be sold shall be paid, together with the interest, if any, due thereon; and unless such money so called for, with interest as aforesaid, shall be paid, every such sale or transfer of any share or shares shall be void, and such share or shares shall be liable to forfeiture, as if no such sale or transfer had been made.

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learned Judge, being of opinion that the plaintiff was not entitled to succeed in this form of action, nonsuited him, but gave him leave to move to enter a verdict with 40*s.* damages, in case the Court should be of a contrary opinion. *Erle* having, in Michaelmas Term last, obtained a rule accordingly,

Kelly and Byles, in the same term (Nov. 12), shewed cause. —The 19th section of the act prescribes the manner in which the shares are to be registered. It enacts that the company shall provide and keep a book or books, and cause to be entered therein the names and designation of the persons subscribing for any share in the undertaking, and of every person entitled to any share therein, making a separate entry of each share in numerical order; and that after the making of such entries, a certificate shall be made out in respect of every share in the undertaking, specifying the number of such share, and the name &c. of the proprietor thereof, and that every such certificate shall be delivered to the proprietor of such share, his executors &c., upon demand. And it then goes on to provide that such certificate shall be evidence of the title to the share described therein; but that the want of such certificate shall not deprive the proprietor thereof of his right to a due proportion of the profits, or from selling or disposing of any such share; and in case the certificate shall not be forthcoming, a copy of the said entry, certified by the secretary of the company, shall be deemed *prima facie* evidence of the title thereto. Then the 20th section provides, that it shall be lawful for the proprietors of any share or shares to sell and transfer by writing, duly stamped, any share or shares of which they shall be possessed; and every such transfer shall be exhibited to the company or their secretary, to be filed by the secretary and kept for the use of the company; and every such transfer shall be registered in the books of the company, by an entry of the date of such registry and the date of such transfer, toge-

ther with the names of the parties thereto and number of the shares transferred; and a copy of such registry or entry, signed by the secretary, shall be sufficient evidence of such sale. Now it is not pretended that the provisions of this latter section have been complied with in this sale. [*Parke, B.*—That section applies only to the sale of registered shares; it does not say that scrip certificates shall not be sold except in that way.] It was impossible for the defendant to have entered these shares without a breach of duty, for the whole number of shares allowed had been already entered in the register pursuant to the act. [*Parke, B.*—The question is, whether, if the company permit these shares to be issued into the market, they are not bound to do that which the act requires to be done respecting every share which shall be issued. The circumstance of the register being full is no answer to an action for refusing to register scrip issued by them.] This is not an action for unlawfully issuing scrip certificates, but for refusing to register them. The right to have the certificates registered is confined to the 10,000. Perhaps the plaintiff might have maintained an action against the directors of the company for improperly issuing shares beyond the number of 10,000 allowed by the act, whereby the plaintiff was unable to get his shares registered: but this is not such an action, but one founded on the right under the statute to have the shares registered. But the register being already full, the plaintiff could have no such right. Besides, in this case advertisements had been published in the newspapers, and notices placed upon the Stock-Exchange, of the frauds practised respecting the shares, cautioning persons not to purchase them: and the plaintiff's broker, who was called as a witness, proved that he had seen those notices before he purchased the shares in question. [*Parke, B.*—Your argument assumes that the 10,000 shares were rightly registered.] Undoubtedly that must be assumed until it is shewn that they were not. [*Parke, B.*—The doubt is on

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Exch. of Pleas, whom the burthen of proof should lie. Supposing that
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W. H. Watson, in support of the rule.—No point was made at the trial as to the transfer of the shares having been properly made; if it had, the plaintiff might have obviated it. And if the learned Judge had decided against the plaintiff, he might have tendered a bill of exceptions, and so raised the point. [Lord *Abinger*, C. B.—As no point was made at the trial as to that, you need not trouble yourself upon it.] Then the onus of shewing that the register was properly filled lay upon the defendants. The act distinguishes between a shareholder and a person entitled

to a share. The 16th section says, that the capital shall be considered as consisting of 10,000 shares. Then, the 19th section provides, that the company shall keep a book, and cause to be entered therein the names of persons who have subscribed, or shall subscribe, for any share in the undertaking, and of every person entitled to any share; and after the making of such entry, a certificate shall be made out in respect to every share in the undertaking, and every such certificate shall be delivered to the proprietor of such share, his executors, &c., upon demand; and then it enacts, that the certificate shall be admitted as evidence of the title of such proprietor, his executors, &c. to the share therein specified. When once a party becomes registered under this act, he becomes a proprietor of shares. This action is brought for not doing that for the plaintiff which the 19th section requires to be done. The plaintiff produces the scrip certificates in the handwriting of the directors, and requests them to register them pursuant to the 19th section. It is no answer to say that there are 10,000 names already entered in the book. The company, who have issued these certificates, ought to shew that they were not properly issued. [*Parke, B.*—The company having proved notice that a number of shares had been improperly issued, and frauds committed, and the plaintiff having purchased these shares with a knowledge of that, the question is, whether he is not bound to shew that they were genuine.] It is no answer that the 10,000 shares were entered in the book, unless they were properly so entered, and they who entered them are bound to shew that they were. If the company wished to guard against frauds, they should have had it provided that the shares should pass only by indorsement in writing. If the defendant had made out that the plaintiff obtained these shares fraudulently, it might have been a different thing; but then the question is, whether that should not be raised by plea. No fraud has been imputed to the plaintiff, and he is therefore entitled to

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have the shares registered; and it is no answer to say that the company have registered other shares, by which the register is full. The defendants allege that their own servant has caused this: that is their own negligence, and they ought to suffer for it, and not the plaintiff. It was the act of the defendants in sending these shares into the world, and they are answerable for it.

Cur. adv. vult.

The judgment of the Court was now (April 25) delivered by

PARKE, B.—There was a case of *Daly v. Thompson*, which was argued two or three terms ago, but stood over for the judgment of the Court. It was an action on the case against the secretary of the Anti-Dry-Rot Company, acting in the name and on the behalf of the company, to recover damages for not making out and delivering to the plaintiff a certificate in respect of twenty shares alleged to have been purchased by him, and for refusing to register those twenty shares in his name. There was a clause in the act of Parliament, that the capital should be £250,000, and the number of shares are to amount to 10,000.

When this case came on to be tried before Lord *Abinger* at Westminster, it was objected, on behalf of the defendant, that this action would not lie, because the register was full, and the defendants had no power to add to the number of shares; and that appearing to be the case, his Lordship was of opinion that the plaintiff ought to be nonsuited; that although he might succeed in another form of action, he could not here. When the matter, however, was brought before the Court, it was thought that the objection taken before Lord *Abinger* could not be sustained; because, if the register was full, and had been improperly filled, the defendants must set up their own misconduct as an answer to the action.

It was objected, on shewing cause, that the plaintiff had not made out a good title to these shares; all that he had done was to produce scrip certificates payable to bearer. It was contended that he ought to have shewn he was entitled to have those particular shares registered, and moreover, that he ought to deduce a good title not only from the original subscriber, but the assignee, in order to give him a right to have his name entered on the register; and that the clause in the act of Parliament, by which it is provided that they should be transferred, does not apply. The plaintiff must shew that he was entitled as assignee of an original subscriber; and there is a serious question, whether he could shew that merely by the production of the scrip certificate payable to bearer, in which it is stated that the share belongs to the bearer of the certificate. To say the least of it, there is great doubt whether any person, not authorized so to do, can make such evidence admissible by an act of this description, as in the case of bills of exchange payable to bearer, or promissory notes, or bills of lading, which are indorsed, and the property of which passes to the bonâ fide bearer of that indorsement:—so also in the case of Exchequer bills and India bonds. This objection, however, was not the ground upon which my Lord *Abinger* decided to nonsuit: and we think there ought to be a new trial, to have that point considered; and if the plaintiff, on that occasion, cannot trace his title to the original subscriber, by shewing who that subscriber was, and by proving an assignment from that person, and so on from all the persons through whom the plaintiff claims, it will be a question whether he will be entitled to recover.

All the members of the Court are not quite agreed in their view of the law upon this part of the case, and therefore I pronounce no opinion upon it at present; but the plaintiff will have an opportunity afforded him of going down to a new trial, and giving such evidence as he may

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be advised of his title; it will, however, be only prudent on his part to take the course I have alluded to, namely, that of deducing his title from the original subscriber.

One objection was taken, that the plaintiff was not the bonâ fide holder of these shares, because he had purchased after notice in the market that many shares were fabricated by a person who was himself in the company for a time; and that was the fact. All the 10,000 shares had been registered, and it may be that the plaintiff has acquired his title through one of the false certificates. The amount, however, of this was, that the shares were depreciated in the market, and the plaintiff paid a less price than the ordinary one; still that would not deprive him of the title he had by the transfer of the certificates; it would, indeed, if the defendants were to shew that he was not the bonâ fide owner; but if that is not proved, the circumstance of his giving a less price for the shares themselves would not deprive him of the right the holder really had. If it were otherwise, the consequence would be to deprive all the shareholders, both good and bad, because they obtained a transfer of the certificates at an under-price. The question will come to this, whether the defendant really is entitled to any shares in the company. As I have observed before, it will be for him to tender any evidence he thinks right; but I cannot fail to observe, that he will act wisely by deducing a title from the original subscriber; if he does that, he will probably succeed in the action; if he does not, he probably will be defeated. That is matter, however, for subsequent consideration. We think that if the register was filled improperly, the nonsuit ought not to have taken place on the ground that it was full, and that there must be a new trial.

Rule absolute for a new trial.

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ASSUMPSIT.—The declaration stated, that on the 25th of March, 1839, by an agreement made between the plaintiff and the defendant, the plaintiff agreed to let, and the defendant to take of the plaintiff, for the term of three years, from the 25th of December, 1839, a house and premises at the yearly rent of £30, payable quarterly; and the defendant, among other things, thereby agreed with the plaintiff, that he the defendant would keep the said premises in as good repair and condition as the same then were, and would so leave the same on the termination of the said tenancy, fair wear and tear excepted. Breach; that, although the defendant entered and paid the rent up to the 29th of September, 1841, yet he did not pay the two quarters' rent which became due on the 25th of March, 1842.

Where the tenant of a house undertakes by his agreement to keep it in as good repair as when he took it, fair wear and tear excepted, he is not entitled to quit upon its becoming uninhabitable for want of other repairs during the term; and the landlord is under no implied obligation to do any repairs in such a case.

Plea, that before the commencement of the period in respect of which the rent was claimed, to wit, on the 29th of June, 1841, the said house and premises, by means and in consequence of age and natural decay, and the badness of the materials thereof, and the bad and improper manner in which they were originally built, and the rotten, foundrous, miry, and insecure state and condition of the walls, timbers, and foundations thereof, and for want of good and sufficient sewerage and drainage, *and by and through the neglect and default of the plaintiff, and not for want of any such repair as the defendant was bound to do* under or by virtue of the said agreement, or by or through any neglect or default of the defendant in that behalf, became and were in a ruinous, bad, insecure, and dangerous state and condition, and wholly unsafe and unfit for habitation, whereof the plaintiff then had notice, and was then requested by the defendant to put the said house and premises into a safe, habitable, and tenantable repair, and a

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fit state and condition to enable the defendant to continue to inhabit and reside therein in safety, which the plaintiff then wholly neglected and refused to do. That, after allowing the plaintiff a reasonable time to put the premises into such a state, and before the commencement of the period in respect of which the rent was claimed, to wit, on the 27th of July, 1841, the defendant quitted and left the said house and premises, and relinquished and gave up the possession thereof to the plaintiff, and had not at any time since used or occupied the same, or any part thereof, or derived any benefit therefrom.

Replication, that the said house and premises did not become, nor were they or either of them in a ruinous, bad, insecure, and dangerous state and condition, and wholly unsafe and unfit for habitation, by means of the badness of the materials thereof, or by or through the bad and improper manner in which the said house and premises were originally built, and the rotten, foundrous, miry, and insecure state and condition of the walls, and the timbers and foundations thereof, and for want of good and sufficient sewerage and drainage, *and by and through the neglect and default of the plaintiff*; but that, on the contrary thereof, the said house and premises became and were in such condition and state as in the said plea mentioned, for want of such repairs as the defendant was bound to do under and by virtue of the said agreement, and by and through the neglect and default of the defendant in that behalf; concluding to the country:—whereupon issue was joined.

At the trial before Lord *Abinger*, C. B., at the Middlesex sittings, after last Easter Term, it was proved by the defendant that the premises in question consisted of a dwelling-house, and that he had taken it under the following agreement:—"Memorandum of agreement made the 25th day of November, 1839, between T. Arden of the one part, and J. T. Pullen of the other part. The said T.

Arden agrees to let, and the said J. T. Pullen agrees to take of the said T. Arden, from the 25th of December, 1809, for the term of three years, and, if he shall continue after that period, then as a yearly tenant (subject to six months' legal notice from either party to the other), a house and premises, situate No. 7, Holloway-terrace, Middlesex, at the clear yearly rent of £30; and the said J. T. Pullen agrees to pay the said rent quarterly, and also all present and future land-tax and sewer-rate, and all other rates and assessments whatsoever in respect of the premises, or any part thereof, on the landlord, tenant, or occupier thereof respectively, when due; and in default thereof, the said T. Arden is hereby authorized to pay the same, or any part thereof, and then, without notice, to recover the amount paid by distress upon the premises, as in case of distress for rent in arrear, or by any other legal proceedings whatsoever, with the expenses thereof respectively. And the said J. T. Pullen also agrees to keep the house and premises in as good repair and condition as the same now are in, and to leave the same on the termination of the tenancy or giving up possession, fair wear and tear excepted, together with all the erections, fixtures, improvements, and other things whatsoever, that shall at any time be erected, fixed, or put up therein."

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It appeared that very extensive settlements had taken place in the building, and thus large gaps in the main walls had been occasioned, and the only mode by which the house could be supported was by shoring it up: that in order to keep the basement free from water, pumping for several hours a day was necessary, and it was then so wet as to be utterly unfit for occupation: that the house having become, from these causes, utterly uninhabitable, the defendant, after giving notice before Michaelmas, 1841, had quitted it by the advice of a surveyor, who stated that had the defendant continued to reside in it, the house would certainly have fallen down. It was also proved, that the only means by

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which it could be repaired was by shoring up and underpinning the house, pulling down the front wall and rebuilding it, laying an entirely new foundation, and making a sewer to carry off the water; and that the mischief was not to be ascribed to the want of ordinary repairs, or to any injury, but simply to the original badness of the foundation, which consisted of soft brick, and to the marshy nature of the soil. The jury thereupon found a verdict for the defendant, subject to a motion to enter a verdict for the plaintiff, if the Court should be of opinion that that portion of the defendant's plea which alleged the dangerous state of the premises to have arisen from the neglect and default of the plaintiff, was in issue, and in point of law was not proved.

Erle having obtained a rule for this purpose, and also for judgment non obstante veredicto,

Crowder (*Butt* was with him) now shewed cause.—The issue joined on the replication is, whether the house became in the state described in the plea for want of such repairs as the defendant under his agreement was bound to make, and through his default. That is the only portion of the replication which traverses the defendant's plea; the rest is mere inducement. If it was the duty of the defendant at all events to make the house habitable, there ought to have been a verdict for the plaintiff; but the defendant was clearly not bound to do the repairs requisite for the purpose of preventing these dilapidations, which rendered the house quite uninhabitable: if he was, he must have reconstructed it altogether. The jury were therefore right in finding in favour of the defendant. [*Alderson*, B.—What has the plaintiff omitted to do, which he ought by his bargain to have done? Lord *Abinger*, C. B.—The defendant says there is an implied contract that the premises are of such stability that they may last during the term, with proper repairs.]

Yes. The agreement is to be construed according to the ordinary understanding of mankind. It never could have been contemplated between the parties that the defendant should undertake to rebuild the house. An implied contract must be introduced, that the house is fairly habitable at the commencement of the term. It cannot be contended, that in the event of the house becoming uninhabitable, and utterly useless to the tenant, his liability to pay the rent should continue. In *Collins v. Barrow* (a), it was held that the tenant of a house, who is bound by agreement to keep it in tenantable repair, may quit without notice in the course of his term, if the premises become unwholesome for want of sufficient drainage, and cannot be kept dry without extravagant and unreasonable labour and expense on his part. That case is precisely in point. *Bayley, B.*, there says, "The tenant is bound to pay rent during the time for which he has contracted, unless he satisfies the jury that under the circumstances he was justified in quitting. I think, however, that in point of law he will be freed from his obligation to reside on the premises, if he makes out to the satisfaction of the jury that the premises were noxious and unwholesome to reside in, and that this state arose from no default or neglect of his own, or none except at an extravagant and unreasonable expense." And in conclusion he observes, that the question will turn on this, "whether the defendant neglected anything which he was able and might reasonably be required to do." In that case the tenant was bound, as in the present case, to keep the premises in tenantable repair. [Lord *Abinger, C. B.*—In that case there was the circumstance that the plaintiff had undertaken to make a new sewer.] But that was no part of the agreement. [*Alderson, B.*—If you take a house in one of the hundreds of Essex, where the country is very damp and

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marshy, may you go away and quit the house if you have the ague? and yet that would seem to follow from this argument. The tenant ought to examine the house before he takes it. He undertakes to keep it in the same condition as it was when he took it.] *Edwards v. Etherington* (a) is also an authority in the defendant's favour, though not so strong perhaps as *Collins v. Barrow*, inasmuch as the tenant was not under any agreement to repair. There it was ruled that a tenant of a house from year to year may quit, without previous notice to his landlord, on the premises becoming unsafe and useless from want of repairs; and that such tenant was not liable in an action for use and occupation, for any rent after the occupation had ceased to be beneficial: and that decision was supported on motion by the Court of Queen's Bench (b). *Baker v. Holtzaffell* (c), where it was held that the landlord might recover in an action for use and occupation, the rent accruing after the premises were burnt down, may perhaps be relied on for the plaintiff; but that was decided on the ground that, although the house was burnt down, the tenant still had the occupation of the land, and had made no offer to deliver it up. Here the defendant had quitted the premises. *Izon v. Gorton* (d) may also be relied on; but that was distinguished from *Barrow v. Collins* and *Edwards v. Etherington*, on the ground that in the latter cases the inability to occupy was occasioned by the default of the landlord, and the like distinction exists in the present case. [Lord Abinger, C. B.—The question is, is there, on letting a house on lease, an implied contract that the house shall endure for the term?] It is submitted there clearly is.

Erle and *Ogle*, in support of the rule.—The material allegation in this plea is, that the house became uninhabitable "by and through the neglect and default of the

(a) Ry. & M. 268.

(b) 7 D. & R. 117.

(c) 4 Taunt. 45.

(d) 5 Bing. N. C. 501; 7 Scott, 537.

plaintiff," and not for want of any such repair as the defendant was bound to do under his agreement; that allegation is traversed by the replication, and this was the issue raised, which the defendant was bound to prove. But the plaintiff was under no obligation to the defendant to do these repairs, for there is no implied contract on the part of the landlord to that effect. If it were, it would necessarily extend to every defect which the tenant was not bound to remedy, and would entitle him to rescind the contract. The obligation to do such repairs as these would lie on the owner of the fee, and the plaintiff might be merely a lessee, and not bound himself to do them. The cases which have been cited only shew that the tenant may put an end to the contract in cases where the landlord has been guilty of some default. [They were then stopped by the Court.]

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LORD ABINGER, C. B.—I am of opinion that, unless there has been some fraud or improper concealment on the part of the plaintiff, which is not suggested, the contract for letting this house was perfectly good. The defendant was, therefore, bound to perform it so long as the plaintiff performed her part of it; and the plea would have been bad if it had not contained the allegation, that the defects arose "by and through the default of the plaintiff." That allegation, being traversed by the replication, became the material part of the issue: and this raised the question whether, when a house turns out to be uninhabitable from such causes as existed in the present instance, the landlord is bound to repair it. I think, that without some express stipulation, he is under no such obligation; and the defendant, consequently, having failed to substantiate the only material part of the issue, the verdict must be entered for the plaintiff.

ALDERSON, B.—I think the contract was perfectly good.

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The rule laid down by *Tindal*, C. J., in *Izon v. Gorton*, is the correct one, that, in order to enable a tenant to avoid his lease, there must be a default on the part of the landlord. He observes, that "the cases in which the tenant has been allowed to withdraw himself from the tenancy, and to refuse payment of rent, will be found to be cases where there has been either error or fraudulent misdescription of the premises which were the subject of the letting, or where the premises have been found to be uninhabitable by the wrongful act or default of the landlord himself." The case of *Collins v. Barrow* cannot be law, unless it is put upon that ground; and most probably that was the ground of the decision, and the statement of the facts in the report is imperfect; for it is to be observed, that some evidence is mentioned which would lead to the conclusion that the landlord must have engaged to make the sewer. Here the plaintiff has done no wrong; she has performed her duty, and therefore she is entitled to a verdict on the plea.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute to enter a verdict for the plaintiff.

June 11.

COTTON v. SAWYER.

Where a defendant was described in a writ of summons as "R. S., of the city of London"—*Held*, that the description was insufficient, although it was stated in the affidavits that sometime before the issuing of the writ he had abandoned his house, and had no regular place of abode.

Semble, that he ought to have been described as of his late abode.

HOGGINS had obtained a rule calling upon the plaintiff to shew cause why the service and copy of the writ of summons should not be set aside for irregularity, with costs,

on the ground that the defendant was described in it as Richard Sawyer, of the city of London generally, without specifying any place or street. The affidavits in answer stated that the defendant had been resident in the city of London, but some time before the issuing of the writ had abandoned his house, and had no regular place of abode there, though he occasionally resorted to the Bull Inn, Aldgate, where he was served with the writ.

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Martin shewed cause.—Under the circumstances detailed in these affidavits, the description was sufficient, as no better description could be given, and the act of Parliament must be construed reasonably. Besides, the form of the rule, to set aside the service and copy of the writ, is irregular. In *Hall v. Redington (a)* an application to set aside the *copy served* was considered nugatory; and as to the service, the writ was served personally. At all events, the defendant has asked too much.

Hoggins, in support of the rule, was stopped by the Court.

PER CURIAM.—The defendant might have been described as of his late abode. The writ is clearly irregular in point of form. The act of Parliament, 2 & 3 Will. 4, c. 39, s. 1, requires “that in every such writ and copy thereof the place and county of the residence, or supposed residence” of the defendant shall be mentioned; and the form given in the schedule also requires it. It would be sufficient to describe a person as of an ordinary town in a particular county; but London is an exception. The copy was therefore irregular; and the service of the writ is the service of the copy of the writ. We think it, however, too doubtful a case to give costs.

Rule absolute, without costs.

(a) 5 M. & W. 605.

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THOMPSON v. NICHOLAS.

A replication of nul tiel record, although it conclude with an ordinary verification, does not require counsel's signature, and the erroneous conclusion does not render it a nullity, so as to entitle the defendant to sign judgment of non pros.

BUTT had obtained a rule to shew cause why a judgment of non pros., signed for want of a replication, should not be set aside. It appeared that the defendant had pleaded a judgment recovered in the Court of Queen's Bench, to which the plaintiff replied nul tiel record, concluding with the ordinary verification. This replication was not signed by counsel.

W. H. Watson shewed cause.—All pleadings concluding with a verification require to be signed by counsel; and even admitting that the conclusion with a verification was not the correct one, that does not exempt this replication from the operation of the general rule.

Butt, in support of the rule, was stopped by the Court.

PER CURIAM.—It is not true, as a universal proposition, that all pleadings which conclude with a verification must be signed by counsel; there are several exceptions, such as non assault demesne, solvit ad diem, and others, among which is this very one of nul tiel record. What, then, is the nature of the replication before us? It is in substance a replication of nul tiel record, of which the most that can be said is, that it would probably be bad on special demurrer, on the ground of the irregularity in its conclusion, in not tendering the proper mode of trying the issue, viz. by the record. But that does not render it a nullity, so as to entitle the defendant to sign judgment of non pros., and this rule must therefore be made absolute.

Rule absolute.

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June 13.

BROWN v. JOHNSON.

DECLARATION by the plaintiff, as owner, against the defendant, as charterer, on a charter party of the ship *Trinidad*, from London to Honduras, there to load at one of the usual places of loading, including the rivers Ulna and Dulce, a cargo of mahogany, and then proceed to some port in the United Kingdom; twenty-five running days for every hundred tons of mahogany to be allowed the defendant, if the ship were not sooner dispatched, for loading the said ship at Honduras, and fifteen days for discharging at her destined port in the United Kingdom, and thirty days on demurrage, over and above the said laying days, at £6 per day. Among other breaches, the declaration alleged, that the ship being ordered to Hull upon her return, by the defendant, he would not discharge the cargo at the said port of Hull within the said number of fifteen days in the charter party mentioned, but detained the vessel after she was ready to discharge her cargo, and the defendant had notice of it, for the space of six days over and above the said fifteen laying days mentioned in the said charter party, whereby a demand for demurrage arose.

To this the defendant pleaded, amongst other pleas, that he did not detain the vessel above the said fifteen laying days, in the said charter party in that behalf mentioned; and also, that he was prevented from unloading by the wrongful act, procurement, neglect, and default of the plaintiff, and his servants and agents; whereupon issues were joined.

At the trial before *Alderson B.*, at the Sittings in Lon-

By a charter-party made in London, upon a vessel for a voyage from London to Honduras and back to some port in the United Kingdom, 25 running days for every 100 tons of mahogany were to be allowed for loading the ship at Honduras, and 15 days for discharging at the destined port in the United Kingdom:—*Held*, that in the absence of any custom, Sundays were to be computed in the calculation of the lay days at the port of discharge.

The ship arrived at Hull, the port of her destination, on the 1st of February, and was reported; on the 2nd, she entered the dock, and was given in charge of the dock-officer, but did not get to the place of unloading till the 4th, in consequence of the full state of the

docks, the officer refusing to take her out of her turn; and the discharge was not completed till the 22nd:—*Held*, that the lay days were to be calculated from the period of her arrival in dock, and not at the place of unloading.

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don in this term, it appeared that, the charter party having been entered into in London, the ship proceeded on her voyage, and arrived with her cargo at Hull, the port of destination, on the 1st of February, 1841, and was reported. On the 2nd she entered the dock, and was given in charge of the dock officer, but did not get up to the place of unloading till the 4th, in consequence of the full state of the docks, the dock officer refusing to take the ship out of her turn, and the discharge was not completed till the 22nd. The defendant's counsel called several witnesses to prove that, by the usage of the trade at Hull, the word "days" meant "working days;" but this they failed to establish. There was evidence that the plaintiff had been dilatory and negligent in the unloading; and the learned Judge, in his summing up, directed the jury, that the period from which the lay days was to commence was the day of her coming into the dock, and not of her coming to her berth, and that Sundays were to be included in the lay days. The jury found a verdict for the plaintiff for £18 for demurrage, declaring that they had included Sundays in their computation of the time allowed for unloading.

Jervis now moved for a new trial on the ground of misdirection, on two points.—First, Sundays ought not to have been included in reckoning the lay days. This was evidently the intention of the parties, from their making a distinction between *running* days and lay days. It may be assumed that the parties contemplated that nothing could be done in England on a Sunday for the purpose of discharging the cargo, as it would be contrary to law. This charter-party was entered into in London; and in *Cochran v. Retberg* (a), where there was a clause in the bill of lading that the cargo should be taken out in a certain number of days, it was found that, by the usage of

(a) 3 Esp. 121.

trade in the city of London, the term "days" means only working days, not running days. And in Abbott on Shipping (a) it is laid down thus: "The word 'days' used alone in a clause of demurrage for unlading in the river Thames, is said to be understood of working days only, and not to comprehend Sundays or holidays by the usage among merchants in London," for which the author cites *Cochran v. Retberg*: undoubtedly he adds that it is better to mention *working* or *running* days expressly. The object for making a distinction between the days to be counted at the port of loading and that of discharge must be apparent to every one. At the former there is no prohibition against working on Sundays, and the owners are at a greater expense, the ship at the time of loading having her full complement of men; whereas, at the port of discharge, a prohibition as to working on Sundays does exist, and her discharge could not proceed on that day; the crew, likewise, would be discharged, and only lumpers, who would receive no wages for that day, would be employed. Secondly, the lay days ought not to have been calculated from the time when the ship got into dock, and into the conduct of the dock officers, but only from the time when she got to her berth in the dock. The lay days are stated to be for "discharging," which means fifteen days which can be employed for that purpose. Here there was no possibility of unloading the vessel until the 4th, when she got to her place of unloading, and the days ought not to have been calculated before that time. In *Brereton v. Chapman* (b), it was held that the lay days allowed by a charter-party for a ship's discharge were to be reckoned from the time of her arrival at the usual place of discharge, and not at the port merely. Here the days might just as well have been reckoned from the time of entering

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(a) P. 180, 5th edition.

(b) 7 Bing. 559; 5 Mo. & P. 526.

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the port.—[*Alderson, B.*—I acted upon the authority of *Randall v. Lynch (a)* and *Brereton v. Chapman*, and said that the period ought to commence from the time the ship came into the dock, and was in charge of the dock officer, who would not take her out of her turn : the delay which then arose was inevitable, and neither party was in fault. I think some stipulation ought to have been made against such an accident, if those days were not to be counted. I did not say that they were chargeable from the entry into the port of Hull, but from the time of her coming into dock. If the *place* in the docks is the point, I was wrong ; if the *dock*, I was right.]

Lord ABINGER, C. B.—My opinion is, that the lay days under this charter-party commenced from the time of the vessel's coming into dock ; it had then arrived at its usual place of discharge. They certainly did not commence at the period of its entering the port, as that might be very extensive ; for instance, Gravesend is part of the port of London. Then, with respect to the days, I think the word "days" and "running days" mean the same thing, viz. consecutive days, unless there be some particular custom. If the parties wish to exclude any days from the computation, they must be expressed.

The rest of the Court concurred.

Rule refused.

(a) 12 East, 181.

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June 13.

QUARRINGTON v. ARTHUR.

COVENANT. The declaration stated, that, by a certain indenture, bearing date the 18th day of October, 1839, made between the plaintiff of the one part, and the defendant and two other persons of the other part, the plaintiff demised to them all mines and beds of coal, ironstone, &c., *which then had been or thereafter, during the continuance of the same demise, should be discovered or opened* under the lands belonging to Dyffryn House; to hold the same from the 29th of September then last past, for the term of twenty-one years, at the yearly rent of £20, to be paid *whether any coal &c. should be worked or not*, paying also the yearly sum of £2 for every acre of surface land taken or used by the defendant, together with the sum of 7d. for every ton of coal or ironstone raised: that the defendant covenanted, jointly and severally with the other persons, that he would at all times during the said demise work the said mines in a proper and workmanlike manner, according to the custom, &c. Breach, that the defendant did not work the said mines, veins, and premises thereby demised, in and under the aforesaid land and premises called Dyffryn, thereinbefore demised, except as aforesaid, in a proper and workmanlike manner, according to the custom, &c.; but, on the contrary thereof, permitted the mines to lie, and the same were, wholly ungotten and uncleared.

There were two other counts on two other and different leases, in which the same breaches were assigned.

The defendant, after setting out the leases on oyer, the

were wholly ungotten. Plea, that the said mines were never at any time before the said demise worked or gotten, nor did he the defendant, at any time since or during the demise, work or get the mines:—*Held*, on demurrer, that inasmuch as it appeared by the pleadings that the mines had not been worked at all, the defendant was not liable on this covenant for not working them in a workmanlike manner, the subject-matter of demise being, not all the mines under the lands specified, but only such as either had been or should be discovered or opened.

Covenant. By an indenture of lease, the plaintiff demised to the defendant all mines and beds of coal, &c., which then had been, or thereafter during the demise should be discovered or opened under the lands belonging to Dyffryn House, at the yearly rent of £20, to be paid whether any coal should be worked or not, together with 7d. per ton for every ton of coal, &c., raised. And the defendant covenanted that he would at all times during the demise work the said mines in a proper and workmanlike manner. Breach, that the defendant did not work the said mines in a proper and workmanlike manner, but, on the contrary, permitted the mines to lie and the same

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substance of which was as stated in the declaration, pleaded that the mines were never at any time, before the said demise, worked, gotten, or cleared in any manner whatever, nor did he, the defendant, at any time since or during the said demise, work, or get, or clear the mines.—Verification.

General demurrer, and joinder in demurrer.

The plaintiff's points for argument were, that the defendant suffered the mines to be unworked and ungotten, whereby the plaintiff was deprived of his rents and royalties over and above the fixed rent, contrary to the covenants contained in the said indentures of lease; and that it was immaterial whether such mines had been worked, gotten, or cleared before the demise, and that the defendant was bound to work and clear the mines in a workmanlike manner, and according to the custom, although they had not been previously worked.

The defendant's point was, that, upon the right construction of the leases, there was no obligation on the defendant to work the mines mentioned in them.

The case was argued in Easter Term (April 25), by

Platt, in support of the demurrer.—The plea is no answer to the action. The object of the plaintiff in letting the mines was that they should be opened and the minerals worked, as well as to have those worked which had been already opened. The parties contemplated the working of new mines as well as the old ones. The plea only amounts to an admission of the cause of action for which the plaintiff has declared. [*Parke*, B.—The question turns on the meaning of the covenant—whether the defendant is to work all the beds of coal, or whether he is to work only such mines as he pleases, working them in a proper manner. The defendant says, that on his paying £20 a-year, which is the fixed rent, he may work any or none, as he pleases.] Unless he is entitled to leave the mines wholly unworked,

the plea is no answer. The defendant covenants that he will, at all times during the demise, work the said mines in a proper and workmanlike manner, according to the custom; and the breach is, that he did not work the said mines in a proper and workmanlike manner, according to the custom; but on the contrary, permitted them to lie, and the same were, wholly ungotten and uncleared. That breach is not denied by the plea, which merely states that the mines had not been opened. If it is a good plea now, it would be so at any period of the term. It is like the case of a lessee covenanting to cultivate a farm in a husbandlike manner and according to the custom of the country, in which case the lessee is bound to cultivate the farm; and it would be no answer to say he did not cultivate it at all. [*Alderson*, B.—When a lessee undertakes to cultivate a farm, he undertakes to cultivate the whole farm. That clearly is not the meaning of this covenant. *Parke*, B.—The covenant applies to all mines which then had been, or thereafter during the demise should be, discovered or opened. The plea does not say that the mines had not been discovered. The question is, whether it is enough to say that they were not worked, gotten, or cleared.]

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Martin, contra.—The true construction of the deed is, that if the parties do work the mines, they shall do so in a proper and workmanlike manner; but if they choose not to work them, they are not bound to do so, paying the fixed rent. The very terms of the reservation of £20 per annum, whether any coal should be worked or not, shews that it was to be optional with the defendant to work them or not. There is nothing in the covenant to compel him to work the mines. The clause reserving the £20 contemplates that there may be no working of the coal, and there could be no breach without it.

Platt, in reply.—If this in terms had been a grant of a

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license merely to work the mines, as in *Muskett v. Hill* (a), it might perhaps have been different; but this is an actual demise of the mines themselves. The argument on the other side would go to the extent that nothing at all was demised. With respect to what has been said as to the £20 being to be paid whether the mines were worked or not, there is nothing in that observation, for if the royalty amounts to more, the payment of that sum is to cease altogether.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—This case was heard before my Brothers *Parke, Rolfe*, and myself, in last term, and the question arose on a demurrer to the second plea. The declaration states that the plaintiff, by deed dated the 13th October 1839, demised to the defendant and two other persons, the mines which at the date of the demise had been, or during the term of twenty-one years thereby created should be, discovered or opened in or under certain lands called Dyffryn House, and the demesne lands thereto adjoining; and in the deed was a covenant by the lessees jointly and severally, that they would during the term work the demised premises in a workmanlike manner, according to the custom. The declaration then avers a breach of that covenant, in not working the said demised premises in a workmanlike manner.

There are three counts in the declaration, founded on three separate demises of different mines, but they are all framed in precisely the same language, so that the decision as to one governs the whole. The defendant pleads by his

(a) 5 Bing. N. C. 694; 7 Scott, 855.

second plea, that the mines in the first count of the declaration mentioned were not at any time before the demise worked, gotten, or cleared in any manner whatever, nor did the defendant and the other lessees, or any of them, work the same or get the mines in any manner whatever: and there are similar pleas as to the other counts. To these pleas the defendant demurred, and the question argued before us was, whether, it appearing by the pleas that the mines had not been worked at all, the defendant was liable on his covenant to work the demised premises, *in a workmanlike manner*.

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It appears to us, on looking at the pleadings and the deeds in question, which are all set out on oyer, and are very long, that the defendant is clearly entitled to judgment; for the subject-matter of the demise in all the deeds is not the mines under the lands specified in the deed, but only such of the mines as had been or should be *discovered or opened*. It is therefore plain, that in order to shew the defendant to have been guilty of any breach of covenant in not working, or not working in a workmanlike manner, the *demised premises*, it was absolutely necessary that the mines, the not working of which is the ground of the alleged breach of covenant, should have been discovered or opened. The contrary to this appears on the face of these pleadings, and we are therefore of opinion that the defendant is entitled to our judgment.

Judgment for the defendant.

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RUSSELL and Others, Assignees of JOSEPH NICHOLL, a
Bankrupt, v. BELL and Another (a).

Indebitatus assumpsit by the assignees of a bankrupt. The first four counts were for goods sold, money paid and had and received, and on an account stated, laying the promises to the bankrupt; the 5th, 6th, and 7th counts were for goods sold, money had and received, and on an account stated, laying the promises to the assignees. Pleas, first, except as to 320*l.*

parcel, &c., and except as to 140*l.* parcel of the sums in the first, second, third and fourth counts mentioned, non assumpsit. Secondly, as to the said sum of 140*l.*, parcel of the monies in the first, second, third, and fourth counts mentioned, a plea of mutual credit, which had been demurred to, and on argument judgment given for the defendant. Thirdly, as to the 320*l.* payment of that sum into Court, which the plaintiffs took out and joined issue, on the plea of non assumpsit. The following were the particulars of demand delivered prior to the pleas. "This action is brought to recover the sum of 140*l.*, the value of certain yarn; also the sum of 316*l.*, the proceeds of a bill of exchange, drawn by J. M. and indorsed by the bankrupt to the defendant; also 4*l.*, the proceeds of a cheque; and 80*l.* in cash; the said yarn, bill of exchange, cheque and cash having been received by the defendants from or by the authority of the bankrupt, about the months of September or October, 1839. The particular date is known to the defendants." At the trial, the cause proceeded for the recovery of the sum of 140*l.* only, and no evidence was adduced as to the 80*l.* cash. It was objected that the plaintiffs were not entitled to go into evidence as to the 140*l.*, as that sum was already satisfied by the judgment upon the demurrer, and that that sum must be struck out of the particulars of demand; but the learned judge received the evidence, giving the defendant leave to move to enter a nonsuit. A rule having been accordingly granted on that ground—*Held*, that the plaintiff was entitled to give evidence of goods sold to the amount of 140*l.*, upon the other counts of the declaration, to which the plea was not pleaded, and might apply the particulars to those counts.

Where a debtor, upon applications made to him by creditors for payment of their debts, made appointments with them to meet him at specified times and places with reference to a settlement of their demands, but failed to keep such appointments:—*Held*, that the failures to keep the appointments constituted acts of bankruptcy, although the places at which the appointments were made were not his usual places of business.

It appeared at the trial, that after the bankruptcy, 85 bundles of yarn, of the value of 114*l.*, had been delivered by the bankrupt to the defendants, as they alleged, to meet an accommodation bill which they were about to give the bankrupt. The goods were accompanied by an invoice, which stated them to be *bought* by the defendants of the bankrupt:—*Held*, under these circumstances, that the assignees might waive the tort, and bring assumpsit for goods sold and delivered.

(a) This case occurred in Hilary Term last, (Jan. 20,) but was unavoidably postponed.

The defendants pleaded, first, except as to the sum of £320, parcel of the sums of money in the declaration mentioned, and except as to the further sum of £140, parcel of the sums in the first, second, third, and fourth counts mentioned, non assumpsit.

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Secondly, as to the said sum of £140 parcel of the monies in the first, second, third, and fourth counts, and not being any part of the sum of £320, parcel &c. in the next plea mentioned, that before notice of any act of bankruptcy, and before the issuing of the fiat, and before action brought, they the defendants gave credit to the bankrupt to a large amount, by accepting certain bills of exchange for his accommodation, and at his request, without any consideration or value, which bills were, before notice of the bankruptcy, negotiated by the bankrupt for his own use and benefit; that the credits so given were likely to end in debts from the bankrupt to the defendants; and that afterwards, and before action, the defendants paid the bills. To this plea there was a special demurrer; but on argument, in Easter Term, 1841 (a), it was held to be sufficient, and judgment was accordingly entered, that the second plea was sufficient to bar the plaintiff from maintaining the action as to the said sum of £140, parcel &c.

The defendants, as to the sum of £320, pleaded payment of that sum into court, which the plaintiffs took out, and joined issue on the plea of non assumpsit.

The following were the particulars of the plaintiffs' demand, delivered under a judge's order the day prior to the delivery of the declaration:—

“ This action is brought to recover the sum of £140, the value of certain yarn; also the sum of £316, the proceeds of a bill of exchange drawn on John Murgatroyd, and indorsed by Joseph Nicholl to the defendants; also £4, the proceeds of a cheque (b); and the sum of £80

(a) See 8 M. & W. 277.

sums of 316*l.* and 4*l.* together, made

(b) It will be perceived that these the sum of 320*l.* paid into Court.

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in cash; the said yarn, bill of exchange, cheque, and cash, having been received by the defendants from or by the authority of the said Joseph Nicholl, about the months of September or October, 1839. The particular date is known to the defendants."

At the trial before Lord *Denman*, C. J., at the last Summer Assizes for the county of York, it appeared that the action was brought to recover the sum of £140 for yarn sold and delivered to the defendants, and £80 for money which it was alleged came to the defendant's hands after the bankruptcy; as to the latter sum, however, no evidence was adduced. It was objected, at the conclusion of the opening speech of the plaintiffs' counsel, that they were not entitled to go into evidence as to the £140, inasmuch as judgment had been already given against them as to that sum on the demurrer; that if it were otherwise, the plaintiffs would be proceeding twice to recover the same sum; that if the judgment had been the other way, and the plaintiffs were to obtain a verdict now for that sum, they would recover the same sum twice over. To this it was answered, that the second plea, on which judgment had been given for the defendants, was confined to the first four counts of the declaration. The learned Judge said he should receive the evidence, giving the defendants leave to move to enter a nonsuit.

The plaintiffs, in order to shew acts of bankruptcy committed by Nicholl (the bankrupt), proved repeated applications made to him by several creditors for payment of debts owing to them from him; that he had made appointments with them to meet him in the months of July, August, and September, 1839, with reference to an arrangement of their demands, at Bradford and Halifax markets, and at certain public-houses; which appointments the bankrupt failed to keep. There was no other evidence as to the bankrupt's denying or absenting himself, but the case rested, in this respect, on the neglect to keep the above appointments.

It was proved by a commission agent of the name of Froggatt, that on the 15th of October, 1839, he had eighty-five bundles of yarn of the bankrupt's in his possession, the value of which he said was about £114; that the bankrupt urged him to buy it, which he refused to do, but advised the bankrupt to sell it, which he said he would try to do. He afterwards came and said he had sold it, and sent a porter for it. Another witness proved that the defendant Bell had admitted to him that the bankrupt, Nicholl, had pressed him to receive some goods which the bankrupt and a porter brought to him, about the value of £100, and that they the defendants had received them. It was objected that there was no evidence of a sale of the goods, or of money had and received by the defendants to the use of the assignees; and the learned Judge being of that opinion, was about to nonsuit the plaintiffs, when the defendant Bell's examination was put in. On being asked when the yarn was delivered, he stated that the goods were sent by the bankrupt on account of an accommodation bill the defendants were about to give him; that the amount was 114*l.* 15*s.*, and that the goods were received by them, he believed, on the 17th of September, 1839; that he could not swear to the precise day, but he had no doubt of it; that the invoice which accompanied them bore that date; that they received no yarns from Froggatt's warehouse but those on the 17th of September. The invoice was as follows:

"Messrs. Harrison & Bell. Sept. 17, 1839.

" Bought of Joseph Nicholl.

" 170 gr. 40 weight at 13*s.* 6*d.* . . . £114 15 0."

It was still objected that there was no evidence of any sale of the goods by the assignees to the defendants, or of money had and received by the defendants to the use of the assignees. The learned Judge, however, thought the plaintiffs entitled to recover, and the jury, under his direction, found a verdict for £114 on the fifth count of the declaration, with leave to the defendants to move to enter a nonsuit.

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Cresswell and *W. H. Watson* now shewed cause.—First, it is said that there having been a plea as to £140, parcel &c., on which judgment was given for the defendants, that sum of £140 is to be struck out of the particulars delivered, and that no evidence can be given as to that sum: but that is treating the plea as pleaded to the particulars, and not to the declaration; the particulars, however, are given merely to restrict the proof at the trial. It can never be said, that because by pleading you get rid of part of the declaration, you get rid of so much of the particulars as the plea is applicable to. Particulars are uncertain and fluctuating things; they are sometimes delivered before declaration, sometimes after, and sometimes after plea pleaded. If the counts in the declaration which are unanswered are sufficient to enable the plaintiffs to recover the sum mentioned in the particulars, it is enough. Before the new rules, the particulars were not annexed to the record, but it had been held that the plaintiff was confined to them in his evidence. But although the plaintiff, after a delivery of particulars, cannot give evidence out of them, yet if the defendant's evidence shews that there were other items which he might have included in his demand, he is entitled to recover all that appears to be due to him. *Hurst v. Watkins* (a). [*Alderson*, B.—If there is any count remaining unanswered after the demurrer, to which the particulars are applicable, you may apply the particulars to that.] *Fisher v. Wainwright* (b) is confirmatory of *Hurst v. Watkins*. In *Ferguson v. Mahon* (c), Lord Denman, C. J., after mentioning the cases which had been cited to shew that the particulars of demand must be taken as part of the declaration, not only for purposes of evidence, but for

(a) 1 Campb. 68.

(b) 1 M. & W. 480.

(c) 9 Ad. & Ell. 247; 1 P. & D. 194.

purposes of pleading, says, "We do not think that those cases establish any such point; nor, as at present advised, are we prepared to agree with them if they did." So in *Meager v. Smith (a)*, *Littledale, J.*, says, "It is, however, urged on the part of the plaintiff, that since the new rules, the case must be treated as if the particulars of demand were a part of the declaration. I cannot agree to this, so far as regards the effect of payment of money into court." Here there is one set of counts on promises to the bankrupt before the bankruptcy, and another on promises to the assignees, and the defendants plead to the first set of counts, and on demurrer judgment is given for them; the plaintiffs may still go to trial on the other issues. But it will be said that these particulars contain only *one sum* of £140, and that that sum has been already answered by the demurrer. But suppose, on the plea being pleaded, the plaintiffs had entered a *nolle prosequi* as to those counts; they might surely have gone to trial on the other issues, and availed themselves of these particulars; and this is the same in effect. The particulars do not claim the £140 as due to the bankrupt.

Then secondly, there was abundant evidence of acts of bankruptcy before the delivery of these goods. At the trial repeated appointments which the bankrupt had made with different creditors were proved, and that he had failed to keep those appointments, which was clearly sufficient. A trader's absenting himself from any place with intent to delay a creditor, is an act of bankruptcy. *Curteis v. Willes (b)*.

Thirdly, there is abundant evidence of goods sold and delivered by the assignees. Here the goods were received by the defendants from the bankrupt after the bankruptcy, accompanied by an invoice stating the price of them, and the assignees are entitled to recover the exact sum invoiced, as they have done. Even supposing this to

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(a) 4 B. & Ad. 679; 1 Nev. & M. 449.

(b) 1 Car. & P. 211; 6 D. & R. 224; Ry. & M. 58.

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be a conversion, the assignees have a right to waive the tort and bring assumpsit. In *Smith v. Hodson* (a), the rule is laid down, that if a bankrupt on the eve of bankruptcy fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods in trover; but if they bring assumpsit they affirm the contract, and then the creditor may set off his debt. Here the assignees have affirmed the contract. The defendants cannot say that they did not take the goods since the bankruptcy, and they are, therefore, clearly liable for them as goods sold by the assignees.

Wortley and Crompton, in support of the rule.—The object of the particulars is to apprise the defendants of what the plaintiffs seek to recover, and they must not be calculated to mislead them. Here the plaintiffs, amongst other things, set up a claim of £140 for yarn sold and delivered. To the counts for goods sold and delivered, &c., by the bankrupt, the defendants have pleaded, as to the £140, a plea which, on demurrer, was held to be a good bar; and that plea states it to be a transaction between the bankrupt and the defendants. [Lord Abinger, C. B.—The particulars are sufficiently vague to admit of *any* parcel of yarn having been delivered to the defendants. *Alderson, B.*—The plaintiffs' particulars restrict them to £140 for yarn sold and delivered, but they may apply that to the other counts.] It is submitted that the plaintiffs have been answered as to the £140. The plaintiffs seek to recover *one sum* of £140, and if they had succeeded on the demurrer, they would have recovered it; and this is the same thing. Suppose the defendants had barely confessed that sum as due on any part of the record, and the plaintiffs had judgment accordingly to recover it, would it be possible to say

that they could recover an additional sum, to the same amount, on the other counts? Here the plaintiffs do in effect recover that sum, because their claim to it is admitted, and they, as to the estate of their bankrupt, have credit for that amount. After credit is given by the defendants in this plea, and taken by the plaintiffs according to the judgment of the Court, could the defendants prove that sum on the bankrupt's estate? It is submitted that they could not, and that the present record would be an answer to any attempt to make such proof. The getting credit for the money on this record exhausts so much of the particulars which, though not part of the record, are to guide the party in pleading, and to prevent the plaintiff from recovering, on any part of the record, more than the particular sum claimed.

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Then secondly, as to the act of bankruptcy. This person's merely failing to meet his creditors at Bradford and Halifax markets, or at certain public-houses which he had appointed, does not amount to an act of bankruptcy. In order to constitute it such, it must be a failure to meet his creditors, pursuant to an appointment, at his place of business. [*Alderson, B.*—If he fails to meet a creditor to pay a debt, which he has appointed to do, it is an act of bankruptcy.] Here there was no evidence that Nicholl stopped away in order to avoid his creditors. [*Lord Abinger, C.B.*—He is proved to have made six or seven different appointments, all of which he failed to keep, and unless a reasonable excuse is given for it, that is an irresistible case to shew that he avoided his creditors.] Thirdly, there was no evidence of any sale or delivery of the goods at all, but it is shewn that the goods were delivered for a totally different purpose. [*Alderson, B.*—You receive goods with an invoice stating a sale to you. It is true the defendant Bell states it to have been on the 17th of September, whereas it appears that it was not until the 15th of October.] It is the ordinary custom, where goods are sent as a security, to send

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an invoice with them. [*Alderson*, B.—You received them under that invoice, stating them to be bought of the bankrupt; can you say that that was not a sale in law?] The plaintiffs rely upon this, in one respect, as a fraudulent preference. It is true you may waive the tort; but you must in that case go on the very contract between the parties, which the law under the circumstances will imply. Now, was there anything here to shew that these goods were to be paid for on request? Certainly not. An invoice is always sent in every transaction of this kind, whether there is a sale or not. This was not a contract for the sale of goods to be paid for on request. *Strutt v. Smith* (a) shews that, although you may waive the tort, still you are bound by the very terms of the sale between the parties. There goods were sold upon the following terms:—7½ per cent. discount, bill at three months, 10 per cent. discount, cash in fourteen days; and it was held that the vendors could not sue in indebitatus assumpsit for goods sold and delivered within the fourteen days, even if the sale had been effected by fraud on the part of the vendee, so that trover might have been maintained for the goods. *Parke*, B., says, "It is clear that the plaintiffs cannot avail themselves of the defendants' fraud, so as to rescind the contract, and substitute a new contract of sale upon different terms. They might possibly on the evidence have maintained trover, on the ground that the fraud vitiated the contract; but if they treat the transaction as a contract at all, they must take the contract altogether, and be bound by the specified terms." In *Bradbury v. Anderton* (b), that principle is applied to a case like the present. It appears, therefore, that where a party proceeds upon a contract instead of insisting on what he might treat as a fraud, he must abide by the terms of the contract. The only evidence of the contract

(a) 1 C. M. & R. 312.

(b) *Ibid.* 486.

here is the examination of the defendant Bell. It appears perfectly clear, upon that examination, that the goods were sent by way of a fraudulent preference, for the payment of a debt or liability. They were, as the plaintiffs alleged, to cover the advance on bills of the favoured creditor. On the case of both the plaintiffs and defendants, the goods were to meet the bills, and not to be paid for on request. An invoice would of course be sent in on such a transaction, as the property in the goods was to pass; but it is submitted that there is not the slightest evidence of a sale of goods to be paid for on request. If it were a fraudulent preference, as contended for by the plaintiffs, the goods were not to be paid for, but to be set against the bills; if the transaction were in consequence of pressure, or not voluntary, still the goods were to meet the bills, and not to be paid for on request.

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LORD ABINGER, C. B. — It appears to me that the argument of the learned counsel for the defendant is untenable on both points. First, as to the bill of particulars. It is perfectly novel to say that a plea is to be construed by, or has any reference to, a bill of particulars; what the Courts have laid down as a settled rule is this—that where a bill of particulars admits a sum of money to be paid, and the plaintiff goes for the balance only, the party shall not be bound to plead payment; that is to say, on non assumpsit he shall be entitled to credit for the amount stated in his bill of particulars without a plea of payment. The plea is to the declaration, and nothing but the declaration. To put the argument of the counsel for the defendant in the light that appears to me to be the strongest, it is this;—we have one set of counts to which there is a plea of mutual credit, to which there was a demurrer, which was determined in favour of the defendants. They say, look at the consequence if you do not consider that as disposing altogether of the plaintiff's

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claim: if the plaintiffs were to prove this claim, and attempt to shew the very debt which is the subject of the set-off in this case, will not this judgment in favour of the defendants upon this plea be decisive evidence between the same parties that they have satisfied the debt by a set-off, and therefore the plaintiffs cannot prove it? But to that argument there is an obvious answer. Suppose the assignees had brought the action, and confined the declaration altogether to counts in assumpsit which had been pleaded to, and there had been judgment for the defendants; so far then the action would have been decided in favour of the defendants: might not the plaintiffs afterwards have brought an action of trover? Is it not every day's practice, where a party is mistaken in his form of action, and is therefore nonsuited, that he brings an action of trover, and recovers the very same sum? It is every day's practice; and was it ever heard, where a defendant has recovered judgment on demurrer, and the plaintiffs, not choosing to abide by that, have brought a different action, and recovered the full amount, that the defendant could set up the first judgment, and say the plaintiff was satisfied, and could not prove the debt? Here is a count that is not applicable to the case, and the defendants have recovered judgment by force of that; upon the count that is applicable the plaintiffs have recovered a verdict. Can it be supposed that any commissioner of bankrupt, upon that state of facts, would say the plaintiffs cannot prove it under the commission? In truth, the two separate sets of counts are just the same as two separate actions. Suppose, for example, on the first class of counts the plaintiff had recovered a verdict on the trial, the defendants having obtained a verdict upon the other, would they not go before the commissioner and say, the assignees cannot recover for anything due to the bankrupt? The whole fallacy of this argument is, that this is a plea to the bill of particulars, but that is not so. The plea is to

the declaration, and to nothing else; and if a party delivers a bill of particulars, without saying he means to confine himself to the demand upon a particular count, he is quite entitled to take advantage of any count in the declaration to which the particulars apply; and if it turns out that the plea does not apply to one count, and does to the other, he may apply the bill of particulars to either. It is no objection, therefore, either in reason or law, to say that the parties are precluded by their particulars from going into evidence to support the second count.

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Then as to the other points. Mr. *Wortley* insists that there is no sufficient evidence in this case of an act of bankruptcy, except that of a sale of the goods. I think I should not have hesitated in directing the jury that any one of these was an act of bankruptcy; but when they are all taken together, they leave no doubt as to the motives of the bankrupt in the evasions he made to his creditors, accompanied as they were by fraud, and this avoiding of creditors is precisely within the very letter of the Bankrupt Act. The case that has been quoted from the *Nisi Prius Reports* is only one of numerous examples of the same sort, in which the parties have made an appointment at a house, not the usual house of the bankrupt, and he failing to keep it, it has not been deemed an act of bankruptcy; but if, to avoid his creditors, a man says, I will meet you at a public-house, or I will meet you at such a place, at such a time, in such a way, and then pay you money, and he is not there at all, that has been held to be an act of bankruptcy. The cases are numerous, but they have not found their way into the reports, except that one case. I think it is clear there was an act of bankruptcy.

Then Mr. *Crompton* says, that if you treat this as a sale, you must treat it as a sale with all the circumstances belonging to it. That proposition is true, with this qualification—if the sale is made by an agent, and properly conducted for the supposed vendor, and the person buying is an honest

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buyer, the vendor must stand to the sale, and is bound by the contract; but if a stranger takes my goods, and delivers them to another man, no doubt a contract may be implied, and I may bring an action either of trover for them, or of assumpsit. This is a declaration framed on a contract implied by law. Where a man gets hold of goods without any actual contract, the law allows the owner to bring assumpsit; that is the solution of it, and gets rid of the whole difficulty. Here the bankrupt took these goods, and delivered them to the defendants; on that an implied assumpsit arises that they are to pay the owners the value of the goods. I think that is an answer to Mr. *Crompton's* argument, and a whole class of cases have decided this point, that you may convert a tort into an action of assumpsit, by bringing an action for the value of the goods so sold, waiving the tort. Here the bankrupt is selling goods under false colours, in order to cover transactions he knew he could not otherwise cover; and he has no right to set up his own fraudulent contract. But the action being brought for goods sold and delivered by the assignees, and not by the bankrupt, the assignees have a right to waive the tort, and bring an action of assumpsit for goods sold and delivered.

ALDERSON, B.—I am of the same opinion. As to the first point, the effect of the bill of particulars, I apprehend, is entirely confined to the plaintiffs' evidence at the trial. Where there is a declaration for goods sold and delivered, and the particulars specify the goods sold, with the amount, giving credit specifically for the sums paid; there the particular is construed to mean, that the defendant is to understand that the plaintiff, at the trial, will be confined, on his general count for goods sold and delivered, to the unpaid-for goods; it restrains his evidence to that. You are not to expect, in such a case, that the plaintiff will give evidence of the whole of the goods which he has delivered

to you, and that you are to get rid of it by shewing you paid for them ; but by his particular he is restrained to a balance, and a balance alone. That is the true construction of the particulars in this case ; they go in restraint of the plaintiff's evidence, and no more. Here the plaintiffs have one claim which they state in two different forms in these counts : in the one case they treat it as a claim that arose to them as assignees, by reason of the sale the bankrupt made ; in another count they treat it as a sale made by themselves as assignees after the bankruptcy ; to which the defendant pleads in effect thus :—' If you treat it as a sale by the bankrupt before the bankruptcy, the bankrupt owed me more money, and I have a good defence against you.' To that plea the plaintiffs demurred, and on the argument the Court were of opinion that the plaintiffs were wrong, and that if it was to be treated as a sale before the bankruptcy, the defendant had a good defence, it being clear that the defendant had counter claims amounting to more than £140. Then the plaintiffs say, that being so, they will go upon the count which treats it as a sale by the assignees after the bankruptcy. It is true, at the trial they are restrained from going for more than the £140 on that count, but that is the only restraint which the particulars impose upon them. That restraint will not avail the defendants on the present occasion, because it must be considered, that the plaintiffs have not given evidence of any thing, excepting that one claim by the bankrupt ; therefore it seems to me that the particulars in this case do not restrain the plaintiffs in the slightest degree ; that their only effect at the trial is to restrain the evidence they are to give, and has no reference whatever to the pleadings.

Then the next point is, whether or not, that being the case, the plaintiffs being at liberty to give evidence of goods sold and delivered by the assignees to the defendant, for which they proceed to claim payment, have they made out that? They shew, long before the 15th day of October,

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acts of bankruptcy committed by the bankrupt, Joseph Nicholl. There was abundant evidence to shew not only one but several acts of bankruptcy before the 15th of October; appointments made with creditors, to meet them at particular places in order to pay them money, and going away and making excuses not founded in fact, and which indeed were no excuses at all, and could leave no doubt in the minds of the jury that he absented himself upon those occasions merely to delay his creditors. That such an absenting is an act of bankruptcy is beyond all possibility of doubt.

Then, if that be so, another question is, has there been a sale subsequent to these acts of bankruptcy to the defendants? I am supposing there are acts of bankruptcy proved prior to the 15th of October. There is proof that Bell comes to the bankrupt and persuades him to sell the yarn to him; there is the examination of Bell, in which he states that he has received the goods; and there is the invoice, in which it is stated that Messrs. Harrison and Bell (that is the defendants) bought of John Nicholl (that is the bankrupt) yarn to the amount of 114*l.* 15*s.* As against the defendants, this is sufficient evidence that they received those goods under a contract of sale for 114*l.* 15*s.* The defendant, when examined before the commissioners, tells a story about the goods; are we to take that story as it is, or are we not rather to take so much only as may reasonably be taken against the defendant, rejecting altogether the rest, and confine him to that on which he incurs responsibility? He must be answerable for that which makes against himself, where he is the offending party. If that be so, as it is a contract of sale, the defendants are bound to pay to these plaintiffs, who are the true proprietors of the goods, the sum they undertook to pay, namely 114*l.* 15*s.*, which is the amount of the verdict.

GURNEY, B., concurred.

Rule discharged.

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VACATION SITTINGS AFTER TRINITY TERM.

WILKS v. SMITH.

June 17.

ASSUMPSIT.—The declaration stated, that theretofore, to wit, on &c., by a certain agreement then made between the plaintiff of the one part, and the defendant of the other part, the plaintiff agreed to sell, and the defendant agreed to purchase, a lot of building ground, situate &c., and which said lot of land the plaintiff agreed to sell, with all the rights and privileges thereto belonging, for the sum of £120, which sum the defendant agreed to pay to the plaintiff in manner following, that is to say, on or before the expiration of four years from the day of the date of the said agreement, with lawful interest at five per cent., half-yearly, until paid. The declaration then alleged mutual promises, and averred, that four years from the day of the date of the said agreement had not yet expired, and that the said sum of £120 had not yet been paid; and that after the making of the said agreement, and before the commencement of this suit, to wit, &c., a large sum of money, to wit, the sum of £12, for two years' interest on the said sum of £120, became and was due and payable from the defendant to the plaintiff under and by virtue of the said agreement. Breach, in non-payment of the £12.

Assumpsit. The declaration alleged, that by an agreement made between the plaintiff and the defendant, the plaintiff agreed to sell, and the defendant to buy, certain building ground for the sum of £120, which the defendant agreed to pay to the plaintiff on or before the expiration of four years, with interest at £5 per cent. half-yearly, until paid; and it averred that the four years had not expired; that the £120 had not been paid; and that £12 had become due for interest:—

Held, that the declaration was good, and that the plaintiff was not bound to aver that he had delivered possession of the land, or that he had title to the land, or was ready and willing to convey it.

General demurrer, and joinder in demurrer.

The defendant's point was, that the first count of the declaration is insufficient, because it does not aver or shew that the plaintiff had any title to the ground in that count

Exch. of Pleas, mentioned or that there was any ability, or readiness, or willingness on the part of the plaintiff, to perform his part of the agreement.

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The points marked for argument on the part of the plaintiff were, that it was unnecessary to aver or shew title to the ground, or a readiness or willingness on his part to perform the agreement, as neither was a condition precedent to his right to recover the interest, which the defendant by his demurrer admits to have accrued due under the agreement. The plaintiff will also contend, that as a day is appointed for payment of the interest, and no time mentioned for performance of that which is the consideration for the interest, it was unnecessary to aver performance, and that the defendant's remedy is by cross-action, if any breach of the agreement has been committed by the plaintiff; and the plaintiff will also contend that it must be presumed he has performed his part of the agreement, and that, if not, the defendant should have pleaded the non-performance.

Warren, in support of the demurrer.—First, the plaintiff ought to have shewn on the face of his declaration, that he had a good title to the land. In *Luxton v. Robinson* (a), it was held that, in an action upon an agreement to deliver possession for certain considerations, subject to a forfeiture on failure by either party, the person who was to deliver possession could not sue for the forfeiture, without shewing in his declaration a possessory title in himself. The party must have that which he assumes to sell, to entitle him to sue, and therefore he was bound to shew he had a title to dispose of it. In *Hallewell v. Morrell* (b), the Court of Common Pleas recognised the doctrine, that a vendor must shew a title to convey. That proposition was advanced by *Stephen*, Serjeant, in argument, and though

(a) 2 Doug. 620.

(b) 1 Man. & Gr. 367; 1 Scott, N. R. 309.

adverted to, was not denied by the Court, who distinguished that case on the ground that it was not a contract for the purchase of an estate, but to execute a deed of covenant. In *Souter v. Drake* (a), it was held that in every contract for the sale of an existing lease, there is an implied contract by the seller (if the contrary be not expressed) to make out the lessor's title to demise; and without shewing such title, the seller cannot maintain an action at law against the buyer, for refusing to complete the purchase. *Roper v. Coombes* (b) is also an authority to shew that a man is not bound to pay money on a contract for sale, before he is satisfied that the vendor can make out a good title to the property sold. Secondly, there is no averment of performance; no allegation, either that the plaintiff had sold the land, or was ready and willing to make an actual sale of it. The declaration ought to have averred, either that he had done so or was ready and willing to do so, otherwise he has no right to claim the purchase-money. That is a condition precedent. [He referred to Mr. Serjeant *Williams's Notes to Pordage v. Cole* (c), and the language of Sir *James Mansfield*, C. J., in delivering the judgment of the Court of Exchequer Chamber in *Smith v. Woodhouse* (d).] In *Stavers v. Curling* (e), *Tindal*, C. J., says, "The rule has been established by a long series of decisions in modern times, that the question, whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case." It is plain, on such an agreement as this, that the party is to be put into possession at once of that which he is to pay for, for the four years; he was to be put in possession immediately, in

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(a) 5 B. & Ad. 992; 3 Nev. & Man. 40.

(b) 6 B. & Cr. 534; 9 D. & R. 562.

(c) 1 Wms. Saund. 320, note 4.

(d) 2 New. Rep. 239.

(e) 3 Bing. N. C. 355; 3 Scott, 740.

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order that he might commence building on the land, and until he was, he was not bound to pay the money. If the plaintiff had averred that he had put him into possession, the defendant might have traversed it. The plaintiff, after alleging mutual promises, ought to have averred performance on his part. In *Laird v. Pim (a)*, where, in assumpsit by the vendor against the purchasers of land, the declaration stated that in consideration of the plaintiff's selling to the defendants certain land, to be paid for as soon as the conveyance should be completed, the defendants promised to purchase and pay for the same; and there was an averment, that *although the plaintiff had allowed the defendants to enter into possession of the lands*, and had always been ready and willing to make a good title, and offered the defendants to execute a conveyance, and would have tendered a proper conveyance, but that the defendant discharged him from so doing. Breach, in non-payment of the purchase-money:—and it was held that the declaration was good. There there was an averment, of the absence of which, in the present case, the plaintiff complains.—He also cited *Mattock v. Kinglake (b)*, and *Poole v. Hill (c)*.

J. W. Smith, contra.—The two questions resolve themselves into one; namely, whether the defendant's promise was in consideration of the plaintiff's *promise*, or of his *performance*. If the defendant promised in consideration of the performance of the contract by the plaintiff, performance must be averred; but if it was in consideration of the plaintiff's promise, the defendant has obtained that for which he contracted to pay the interest. In the present agreement no time is fixed for delivering possession of the land, but a time is fixed for the payment of the purchase-money. In *Mattock v. Kinglake, Littledale, J.* says, "A time being fixed for payment, and none for

(a) 7 M. & W. 474.

(b) 10 Ad. & Ell. 50; 2 Per. & D. 343.

(c) 6 M. & W. 835.

doing that which was the consideration for the payment, an action lies for the purchase-money without averring performance of the consideration. An action for not executing a conveyance of the premises might have been maintained by the defendant before the day of payment; and in such action no allegation of payment would have been necessary. The covenants are independent, and each party has relied upon his remedy by action against the other." Here the defendant might at any time have brought an action against the plaintiff for non-performance of the agreement on his part. The promise is the consideration, and not the performance by the plaintiff. In *Campbell v. Jones* (a), the same principle is laid down; and that decision was recognised and approved by the Court in *Glazebrook v. Woodrow* (b). In *Pordage v. Cole* (c), the declaration was similar to the present, and there it was held that the covenant was an independent one, and that the vendor might bring an action for the money, before any conveyance by him of the land. In the notes to that case (d) the rule is laid down thus: "If a day be appointed for payment of money or part of it, or for doing any other act, and the day *is* to happen, or *may* happen *before* the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act, *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent; and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act."

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Warren, in reply.—The agreement being that the defendant was to pay interest for four years, or until the principal money was paid, shews that he was to be put into

(a) 6 T. R. 570.

(b) 8 T. R. 366.

(c) 1 Saund. 319.

(d) P. 320.

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Special demurrer, assigning for causes, that it was not stated by the plea what goods, or what kind of goods, being in a damaged condition, the plaintiff replenished and did up, nor with what pawnbroker or pawnbrokers the said goods so replenished and done up were pledged.

Erle, in support of the demurrer.—This plea is much too general and vague in its statements; the plaintiff cannot learn from it what he is to come to prove or disprove. It is in effect only a general plea that the plaintiff carried on his business in a disreputable manner, which is the libel itself. The defendant cannot justify by merely repeating the general imputations of the slanderous words. This plea would not give the plaintiff any notion what were the goods alleged to be replenished and done up, or when or with whom they were pledged. If the defendant had the evidence of his statement, he might have specified the goods and the persons. The justification must set forth issuable facts. *Jones v. Stevens* (a), *Newman v. Bailey* (b), *J'anson v. Stuart* (c), *Holmes v. Catesby* (d). [*Parke, B.*—It is very difficult to distinguish this case from *Newman v. Bailey*.]

The Court then called on

G. T. White, contra.—The case of *Newman v. Bailey* is distinguishable, on the ground that there, for aught that appeared specifically on the plea, the plaintiff might have inflicted penalties for many different kinds of offences, and collected fines from all sorts of people: nothing specific was there alleged. Here the plea begins by charging the plaintiff with an unfair mode of conducting the business of a *pawnbroker and silversmith*; and then the defendant points out, with sufficient precision, with reference to the

(a) 11 Price, 235.

(b) 2 Chit. R. 665.

(c) 1 T. R. 748.

(d) 1 Taunt. 543.

rule which prevents him from pleading a multiplicity of matters, the kind and nature of such dishonourable dealings. What goods the plaintiff did up, or with what pawnbrokers he pledged them, must (assuming the plea to be true) be peculiarly within his own knowledge. [*Parke, B.*—Your argument would be equally good, if it were a plea that the plaintiff had committed divers felonies. *Alderson, B.*—The plea ought to state the charge with the same precision as in an indictment.] It is clearly not necessary to set forth a multitude of specific instances; “it being a rule of pleading, that where a subject comprehends multiplicity of matter, there, in order to avoid prolixity, the law allows of general pleading;” 2 Saund. 411, n. (4); *Cornwallis v. Savery* (a), *Shum v. Farrington* (b), *Barton v. Webb* (c). [*Alderson, B.*—In those cases the substantial breach was the not accounting for a gross sum, received in parts. But here every individual act of *duffing* would be a sufficient answer to the action.] But the defendant ought not to be tied up to plead and prove one particular act. He is not to plead matter of evidence, which lies within the plaintiff’s knowledge; *Gale v. Reed* (d). The defendant points out a specific *class* of acts, and that is sufficient.

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PARKE, B.—It is a perfectly well-established rule in cases of libel or slander, that where the charge is general in its nature, the defendant, in a plea of justification, must state some specific instances of the misconduct imputed to the plaintiff. That is settled by the cases of *J’anson v. Stuart*, *Newman v. Bailey*, and *Holmes v. Catesby*. In some of those cases, perhaps, the statement in the plea was not so specific as it is here, but still this is not specific enough: the plea should have stated the description of the goods, or at least the names of the pawnbrokers with whom they were pledged. As it is, the statement is so general,

(a) 2 Burr. 772.

(b) 1 Bos. & P. 640.

(c) 8 T. R. 459.

(d) 8 East, 80.

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that the plaintiff cannot know with what he is intended to be charged. The defendant is bound to give him information of some specific acts with which he intends to charge him. This plea does not do that, and is therefore bad. With respect to the cases which have been referred to, of actions for not accounting for monies, the reason for the exception in those cases is, that there the charge is for not accounting for an aggregate sum received; and it is held to be sufficient, in order to avoid multiplicity of pleading, to assign a general breach, that the defendant received divers sums of money, which he did not pay over. None of those decisions have any application to cases of libel or slander. The plea is therefore bad, and the judgment must be for the plaintiff.

ALDERSON, B.—I am of the same opinion. The object of the plea is to give the plaintiff information what it is of which the defendant means to accuse him. Mr. *White* says that must be within the plaintiff's knowledge; but that is not the case: what the plaintiff has actually done in the course of his business is within his knowledge, but not what the defendant mistakenly or wickedly means to charge him with having done; that is peculiarly within the defendant's knowledge, and it is because it is so that he is to plead it.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

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June 22.

EAVESTAFF v. RUSSELL.

DEBT for goods sold and delivered, and on an account stated. Plea, that the said several *supposed* causes of action in the declaration mentioned did not accrue to the plaintiff within six years next before the commencement of the suit. Special demurrer, on the ground that the plea, although it professed to be pleaded in confession and avoidance, did not contain any sufficient confession that the plaintiff ever had any cause of action.—Joinder in demurrer.

A plea, that the said several *supposed* causes of action in the declaration mentioned did not accrue to the plaintiff within six years next before the commencement of the suit, is good.

Peacock, in support of the demurrer.—The term “*supposed* causes of action” does not amount to a sufficient admission that there ever was a cause of action in the plaintiff. *Gale v. Capern* (a) may perhaps be relied on for the defendant. There a plea of set-off stated, that the plaintiff made his promissory note payable to A. C., which was duly indorsed and delivered to the defendant after the death of A. C., by his administrator, and was unpaid. The plaintiff replied, that “the said *supposed* debt and cause of set-off, upon the said promissory note, did not accrue to the defendant within six years;” and it was held that the replication admitted, not only the making of the note, but also the indorsement of it to the defendant. But that case is distinguishable, because there the replication expressly referred to the cause of action “upon the promissory note.” In *Margetts v. Bays* (b), a plea that “the said *supposed* debt in the declaration mentioned, if any such there be, did not accrue within six years,” was held bad, as not sufficiently confessing and avoiding the debt: and on *Gale v. Capern* being cited, Lord Denman, C. J., said, “That was after trial; but here the form of

(a) 1 Ad. & E. 102; 3 Nev. & M. 863.

(b) 4 Ad. & Ell. 489; 6 Nev. & Man. 228.

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the plea is specially demurred to, which makes all the difference." [*Parke*, B.—*Gould v. Lasbury* (a) is an authority against you. There this Court, after conference with the Court of King's Bench, held that a plea in bar, which alleged that the defendant was discharged under the Insolvent Debtors' Act "from the said debts and causes of action, if any, and each and every of them," was bad: but Lord *Lyndhurst*, in the course of the argument, observed that "the word *supposed* may, perhaps, be considered as no more than *alleged*," and stated that he found that word in several of the forms adverted to at the bar, but not the words "if any such there be."] His Lordship afterwards says, that "it is difficult to distinguish the expression *supposed* from that of *if any*." [*Alderson*, B.—Surely the *supposed* cause of action must mean the *alleged* cause. *Parke*, B.—In *Margetts v. Bays* the words made it doubtful whether any debt existed at all].

Udall, contra, referred to *Gwillim v. Daniell* (b), and was stopped by the Court.

PARKE, B.—There can be no doubt whatever that the word "*supposed*" is a sufficient admission of a cause of action. It is the usual and ordinary mode of pleading in cases of this nature; and I have seen instances without number, where, after a plea of the general issue, a special plea has followed, professing to answer the *supposed* causes of action in the declaration mentioned. The words "if any" stand on a different footing, and although sufficient in a plea in abatement, they are not so in a plea in bar, because they leave it doubtful whether any debt at all ever existed.

ALDERSON, B., and ROLFE, B., concurred.

Judgment for the defendant.

(a) 1 C. M. & R. 254; 4 Tyr. 363.

(b) 2 C. M. & R. 68.

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June 22.

MITCHELL v. CRAGG.

ASSUMPSIT on a bill of exchange for 16*l.* 12*s.*, drawn by Messrs. Fogo & George, upon and accepted by the defendant, and indorsed by Fogo & George to the plaintiff.

The defendant pleaded, thirdly, that after the said bill became due, Fogo & George, being then the holders thereof, applied to the defendant for payment of the amount of the said bill; that the defendant then paid to Fogo & George the several sums of 4*l.* 12*s.* and 2*l.* 10*s.*, which sums, together with the price and value of a certain horse which the defendant had then sold to the said Fogo & George, (and the price and value of which, it was then agreed by and between the defendant and Fogo & George, should be set off and allowed against the defendant's said acceptance), Fogo & George accepted in full satisfaction and discharge of the amount of the said bill, and of the defendant's acceptance; and that the said bill was not indorsed or transferred to the plaintiff until after the said satisfaction and discharge, and after the said bill became due and payable.

Fourth plea:—That before the said bill came into the possession of the plaintiff, it was indorsed in blank by Fogo & George to Cadman & Co.; and that after it

To a declaration against the acceptor of a bill of exchange for 16*l.* 12*s.*, drawn by F. & G., and indorsed by them to the plaintiff, the defendant pleaded as follows:—1st, That after the bill became due, F. & G., being then the holders, applied to the defendant for payment of the bill; that the defendant paid them 7*l.* 2*s.*, which, together with the price of a horse which the defendant had sold to F. & G., and the price of which, it was agreed between them, should be set off and allowed against the defendant's acceptance, F. & G. accepted in

satisfaction and discharge of the bill; and that the bill was not indorsed to the plaintiff until after the said satisfaction and discharge, and after it became due. 2ndly, That before the bill came into the possession of the plaintiff, it was indorsed in blank by F. & G. to C. & Co.; and that after it became due, it being then in the hands of C. & Co., F. & G. gave C. & Co. another bill, accepted by them, for the same amount, which C. & Co. received on account of the first-mentioned bill, and which was paid by F. & G. at maturity; that after the second bill was so given, the defendant paid to F. & G. 7*l.* 2*s.*, &c. &c. [as in the first plea]; that at the time of the giving of the second bill by F. & G. as aforesaid, and at the time of the said settlement between the defendant and F. & G., the bill in the declaration mentioned remained in the hands of C. & Co., and was not indorsed to the plaintiff until after the giving of the second bill by F. & G., nor until after it became due. To each of these pleas the plaintiff replied, "that the said plea, and the statements therein contained, in manner and form as the same are therein pleaded, are not true in substance and in fact;" concluding to the country.

Held, first, that the replication was bad on special demurrer, as being an informal *de injuriâ*; secondly, that the pleas were bad in substance, because they did not shew that the sum paid by the defendant, together with the price of the horse, equalled the amount of the bill of exchange.

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became due, it then being in the hands of Cadman & Co., Fogo & George gave to Cadman and Co. a certain other bill of exchange, accepted by them the said Fogo & George, for the sum of 16*l.* 12*s.*, which said last-mentioned bill Cadman & Co. received on account of the said first-mentioned bill of exchange, and which was duly paid by Fogo & George at its maturity: that after the said second bill of exchange was so given as aforesaid, the defendant paid to Fogo & George the several sums of 4*l.* 12*s.* and 2*l.* 10*s.*, which said sums, together with the price and value of a certain horse which the defendant had then sold to Fogo & George, and the price and value of which, it was agreed between the defendant and Fogo & George, should be set off against the said acceptance of the defendant, Fogo & George then accepted in full satisfaction and discharge of the amount of the said first-mentioned bill of exchange, and of the defendant's said acceptance: that at the time of the giving of the said second bill by Fogo & George as aforesaid, and at the time of the said settlement between the defendant and Fogo & George, the said bill of exchange in the declaration mentioned remained in the hands of Cadman & Co., and that the same was not indorsed or transferred to the plaintiff until after the said satisfaction and discharge, nor until after the giving of the said second bill by Fogo & George to Cadman & Co., nor until after the said bill became due.

To each of these pleas there was the following replication:—That the said plea, and the statements therein contained, in manner and form as the same are therein pleaded and set forth, are not true in substance and fact; concluding to the country.

Special demurrer, assigning for causes, that the replication improperly attempted to put in issue all the matters alleged in the plea, and was multifarious and improper, not being a replication in form *de injuriâ*; and that the pleas contained matter of discharge, and also justified un-

der an authority, and therefore the general replication was insufficient.—Joinder in demurrer.

The principal point marked for argument on the part of the plaintiff was, that the defendant attempted, in his third and fourth pleas, to shew a discharge of his liability as acceptor by an accord and satisfaction with Fogo & George, but stated no facts amounting to a good accord and satisfaction, or to a good discharge of the said bill of exchange in any way.

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Martin, in support of the demurrer.—First, the pleas are good, at least on general demurrer. The plaintiff, having taken the bill after it became due, took it with all the equities belonging to it, and can have no better title than the parties from whom he received it: *Bayley on Bills*, 137; *Burrough v. Moss* (a). Their interest in the bill, therefore, being satisfied, the plaintiff can have no right of action upon it. Secondly, the replication is clearly bad. It is merely an informal *de injuriâ*. And it may well be contended that the replication *de injuriâ* would be insufficient in this case; for as the breach is complete upon the failure of the acceptor to pay the bill when due, the facts alleged in the pleas do not go to shew an excuse for his breach of promise, but a discharge of the cause of action by matter subsequent. *Schild v. Kilpin* (b), *Salter v. Purchell* (c). [*Parke, B.*—I see no reason why *de injuriâ* should not be replied in this case. The plea sets up matter of excuse for the non-payment of the bill; the defendant admits he has not paid the bill, which, as acceptor, he was bound to pay; and his defence is that the plaintiff was an indorsee under such circumstances as disentitle him to recover. The case resembles that of *Isaac v. Farrar* (d). The objection to the form of replication which has been adopted here is, that it appears to put in issue every fact alleged in the plea,

(a) 10 B. & Cr. 558; 5 Man. & Ry. 296.

(b) 8 M. & W. 673.

(c) 1 Ad. & El. (N. S.), 197; 1 G. & D. 693.

(d) 1 M. & W. 65.

Exch. of Pleas, 1842. *whereas de injuriâ puts in issue only those facts which are material.]*

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J. W. Smith, contra.—The pleas are bad in substance. In the first place, the accord and satisfaction ought to have been pleaded to the damages, as well as to the debt; *Francis v. Crywell (a)*. Here the allegation is only that Fogo & George accepted the sums paid to them by the defendant, and the price of the horse, “in satisfaction and discharge of *the amount of the said bill*, and of the defendant’s acceptance.” But a bill of exchange, when due, bears interest, which is recoverable as damages. [*Parke, B.*—The question is, whether, on general demurrer, it is not sufficient to state that a certain sum was received in satisfaction of *the amount* of a bill of exchange, consisting of principal money and interest. It might not be sufficient on special demurrer, but on general demurrer it seems to me that the “amount” of a bill of exchange may well be taken to mean all that is due upon it.]

Secondly, no good accord and satisfaction appears on the plea: for as the price of the horse is not named, it does not appear that the two sums of money specifically mentioned, and the price of the horse, were together equal to the sum as to which the accord and satisfaction is pleaded. —On this point he cited *Thomas v. Heathorn (b)*, *Everard v. Paterson (c)*, and *Fulmerston v. Steward (d)*, and was then stopped by the Court.

Martin, in reply.—The pleas are sufficient on general demurrer. The price of the horse must be taken to have been the difference between 7*l.* 2*s.*, the aggregate of the two sums mentioned in the pleas, and 16*l.* 12*s.*, the amount of the bill of exchange. But further, the rule that payment of a smaller sum is no satisfaction of a greater, is

(a) 5 B. & Ald. 886.

(c) 6 Taunt. 645; 2 Marsh.

(b) 2 B. & Cr. 477; 3 D. & R. 304.

647.

(d) Plowd. 104, a.

confined to the case of accord and satisfaction by money payments: a chattel worth ten pounds may be taken in satisfaction of a debt of ten thousand.

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PARKE, B.—I think the pleas are bad in substance. It is left uncertain whether the horse was sold for a fixed price, or upon a quantum valebat. It is consistent with the statements in the pleas that the horse was sold for £5; if that was the case, that sum, together with the 7*l.* 2*s.*, would not equal the amount of the bill, and consequently would not be any satisfaction. The defendant may amend on the usual terms, otherwise there will be judgment for the plaintiff.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Leave to the defendant to amend on payment of costs, otherwise

Judgment for the plaintiff.

TUCKER v. WEBSTER.

June 22.

DEBT for work and labour as an attorney, money paid, &c.

Plea, that after the accruing of the debts and causes of action in the declaration mentioned, and before the commencement of the suit, the plaintiff, then being a prisoner in actual custody within the walls of a certain prison, &c., to wit, the Fleet, upon process for and by reason of a certain debt, to wit, at the suit of one W. B., did duly, and according to the directions and provisions of

A plea of the plaintiff's discharge under the Insolvent Debtors' Act, ought to aver that the vesting order was made before the commencement of the suit. But such a plea need not allege that the petition was not dismissed, or

that the vesting order is still in force, nor that the petition was filed, and the vesting order made, after the stat. 1 & 2 Vict. c. 110 came into operation.

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the statute made and passed in the second year of the reign of her present Majesty Queen Victoria, intituled, "An act for abolishing arrest on mesne process, in civil actions, except in certain cases, for extending the remedies of creditors against the property of debtors, and for amending the laws for the relief of insolvent debtors in England," apply by petition, in a summary way, to the Court for the Relief of Insolvent Debtors in England, for his discharge from such custody, according to the provisions of the said act, which said petition was then duly subscribed by the plaintiff, and contained all such matter and things as are required by the said act, and was afterwards, to wit, &c., filed in the said Court, pursuant to the directions in the said act contained; that after the filing of the said petition, the said Court for the Relief of Insolvent Debtors, did order that all the real and personal estate and effects of the plaintiff, both within this realm and abroad, except the wearing apparel, bedding, and other such necessaries of the plaintiff and his family, and not exceeding in the whole the value of £20, and all the future estate, right, title, interest, and trust of the plaintiff, in or to any real and personal estate and effects within this realm, &c., and all debts due or growing due to the plaintiff, or to be due to him before such discharge as aforesaid, should be vested in the provisional assignee, for the time being, of the estates and effects of the insolvent debtors in England; that the said order was afterwards, to wit, &c., duly entered of record in the same Court, and thereupon, by virtue of the said order, the debts, rights, and causes of action in the declaration mentioned, and each and every of them, and the sums of money alleged to be due from the defendant to the plaintiff, vested in the provisional assignee, &c. Verification.

Special demurrer, assigning for causes, that the plea should have alleged that the petition was not dismissed; that the vesting order was made before the commencement

of the suit, and is still in force; and also that it is not averred by the plea, that the petition was filed, or the vesting order made, after the statute came into operation.

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Wordsworth, in support of the demurrer.—This plea is pleaded with reference to the 35th and 37th sections of the stat. 1 & 2 Vict. c. 110. The 35th section enables persons in actual custody, within any prison, for or by reason of any debt, damages, costs, &c., or by reason of any contempt of Court, for non-payment of any sum of money, &c., to apply by petition in a summary way to the Insolvent Court for their discharge, and prescribes the mode of petitioning, and the matters to be stated in the petition. The 37th section enacts, that upon the filing of such petition by such prisoner, it shall be lawful for the said Court, and such Court is thereby authorized and required to order, that all the real and personal estate and effects of such prisoner, except the wearing apparel, bedding, and other such necessities of such person and his family, &c., and all the future estate, right, title, and interest of such prisoner in or to any real or personal estate and effects, &c., shall be vested in the provisional assignee for the time being, and such order shall be entered of record in the same Court; provided always, that in case the petition of any such prisoner shall be dismissed by the said Court, such vesting order shall be null and void to all intents and purposes. The plea ought to have averred that the petition had not been dismissed. In all cases where a party seeks to avail himself of a clause in an act of Parliament, which contains an exception or proviso, he ought to negative that the case comes within that exception. That is the rule laid down by Lord Abinger, C. B., in *Grand Junction Railway Company v. White* (a); and in *Vavasour v. Ormrod* (b), Lord Tenterden, C. J., says, "If an act of

(a) 8 M. & W. 221.

(b) 6 B. & Cr. 432.

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Parliament or a private instrument contain in it, first a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause, which operates as an exception. But if the exception itself be incorporated in the general clause, then the party relying upon it must, in pleading, state it with the exception." [*Parke, B.*—In that case it was an exception, not a proviso.] Other cases are put in Bacon's Abr. 469, Statute, (L), where it is said, "If there be in the same clause of an act of Parliament, which is pleaded, any proviso or exception, this must be recited, although it should make against the party reciting it, for as the proviso or exception is parcel of the clause which is pleaded, if this should be omitted, it would amount to a misrecital of the clause." [*Parke, B.*—If it comes by way of proviso or defeazance, whether it is in the same clause or another, it makes no difference. This is a defeazance by matter subsequent, and it is sufficient for the defendant to shew the vesting order, which by the statute took the property, and the right to sue out of the plaintiff. If the petition has been in point of fact dismissed, the plaintiff should have shewn that in answer.] Then there is another objection, which is, that the plea does not shew that the vesting order was made before the commencement of the suit; and it cannot be implied, for the defence would be equally good though it were made subsequent to the commencement of the suit, only in that case it must have been pleaded against the further maintenance of the action, and not in bar of the action generally. The plea ought also to have alleged that the vesting order was still in force, so as to have given the plaintiff an opportunity of putting that fact in issue. [*Parke, B.*—That is so where the defendant pleads his own discharge.] If the plea had cou-

cluded that the vesting order was still in force, the plaintiff would have had an opportunity of traversing that averment, which now he cannot do. Another objection is, that the plea does not aver that the petition was filed, or the vesting order made, after the stat. 1 & 2 Vict. c. 110 came into operation. [*Alderson*, B.—The plea states that the plaintiff petitioned according to the directions and provisions of the act, which he could not have done before the act passed.] In *Parkinson v. Whitehead* (a), where a declaration stated, that theretofore, to wit, on the 31st of May, 1825, by an agreement in writing, the defendant's testator agreed, within two years from *Midsummer then next*, to build certain houses, and alleged for breach that the houses, at the commencement of the action (1839), were unbuilt, contrary to the agreement; it was held bad on general demurrer, for not shewing that two years from *Midsummer* next after the making of the agreement had elapsed previous to the commencement of the suit.

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Pearson, contra, was requested to confine himself to the objection, that the plea had not averred that the vesting order was made before the commencement of the suit.—It is sufficiently averred in substance that it was so. The plea alleges that “after the accruing of the debts and causes of action in the declaration mentioned, and before the commencement of the suit, the plaintiff, then being a prisoner in actual custody, did duly and according to the provisions of the statute made and passed in the second year of the reign of her present Majesty Queen Victoria, &c.,” apply by petition in a summary way to the Court for Relief of Insolvent Debtors, for his discharge from such custody according to the provisions of the said act, which said petition was then duly subscribed by the plaintiff, and was afterwards, to wit, &c., filed in the said Court,

(a) 2 Man. & G. 329; 2 Scott, New Rep. 620.

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Parliament or a private instrument contain in it, first a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause, which operates as an exception. But if the exception itself be incorporated in the general clause, then the party relying upon it must, in pleading, state it with the exception." [Parke, B.—In that case it was an exception, not a proviso.] Other cases are put in Bacon's Abr. 469, Statute, (L), where it is said, "If there be in the same clause of an act of Parliament, which is pleaded, any proviso or exception, this must be recited, although it should make against the party reciting it, for as the proviso or exception is parcel of the clause which is pleaded, if this should be omitted, it would amount to a misrecital of the clause." [Parke, B.—If it comes by way of proviso or defeazance, whether it is in the same clause or another, it makes no difference. This is a defeazance by matter subsequent, and it is sufficient for the defendant to shew the vesting order, which by the statute took the property, and the right to sue out of the plaintiff. If the petition has been in point of fact dismissed, the plaintiff should have shewn that in answer.] Then there is another objection, which is, that the plea does not shew that the vesting order was made before the commencement of the suit; and it cannot be implied, for the defence would be equally good though it were made subsequent to the commencement of the suit, only in that case it must have been pleaded against the further maintenance of the action, and not in bar of the action generally. The plea ought also to have alleged that the vesting order was still in force, so as to have given the plaintiff an opportunity of putting that fact in issue. [Parke, B.—That is so where the defendant pleads his own discharge.] If the plea had con-

cluded that the vesting order was still in force, the plaintiff would have had an opportunity of traversing that averment, which now he cannot do. Another objection is, that the plea does not aver that the petition was filed, or the vesting order made, after the stat. 1 & 2 Vict. c. 110 came into operation. [*Alderson*, B.—The plea states that the plaintiff petitioned according to the directions and provisions of the act, which he could not have done before the act passed.] In *Parkinson v. Whitehead* (a), where a declaration stated, that theretofore, to wit, on the 31st of May, 1825, by an agreement in writing, the defendant's testator agreed, within two years from *Midsummer then next*, to build certain houses, and alleged for breach that the houses, at the commencement of the action (1839), were unbuilt, contrary to the agreement; it was held bad on general demurrer, for not shewing that two years from *Midsummer next* after the making of the agreement had elapsed previous to the commencement of the suit.

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(a) 2 Man. & G. 329; 2 Scott, New Rep. 620.

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pursuant to the directions in the said act contained; that after the filing of the petition the said Court made the order, and that the said order was afterwards, to wit, on &c., duly entered of record in the same Court. The day and year there stated, though under a videlicet, must be taken to be before the commencement of the suit. But it is not necessary to aver it, for it will be intended to be before the commencement of the suit, unless the contrary appears. It is a rule of pleading that it is not necessary to aver time with the same particularity in a plea as in a declaration.

Wordsworth, in reply, relied upon *Parkinson v. Whitehead*.

PARKE, B.—We will consider the last point, as to whether the vesting order must be intended to be before the commencement of the suit unless the contrary appears. With regard to the other objections, we think there is nothing in them.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This was an action for work and labour as an attorney. The declaration was dated the 18th March, 1842, and the plea, which was dated the 20th April, states, that after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, the plaintiff, then being a prisoner, did duly, and according to the provisions of the 1 & 2 Vict. c. 110, petition the Court for the Relief of Insolvent Debtors, for his discharge; it then avers, that the Court ordered that all the real and personal estate and effects of the plaintiff, and the debts due and growing due to the plaintiff, should be vested in the provisional assignee. There were several objections to the plea; but the only one we wished to con-

sider, was, whether the plea is good on special demurrer, it not being averred that the vesting order was made before the commencement of the suit. We think the plea bad on that ground. Under the old form of pleading it would not have been necessary to make such an averment, because the plea having reference to the same time as the declaration, and all proceedings on the record being in contemplation of law on the same day, it would have been necessarily intended that the act took place before the commencement of the suit. But in this case, the declaration is dated the 18th March, and the plea the 20th April; and therefore it must be taken that the order was made on the day of the date of the plea, unless it is averred that it was made before the commencement of the suit. It is uncertain whether the order was made before or since; if since, the defence should have been pleaded against the further maintenance of the suit; if before, it should have been so averred. There must be judgment for the plaintiff, unless the defendant amends on payment of costs. There was no difference, under the old form of pleading, whether the proceedings were by original or by bill; in either case the fact would have been intended to have taken place before the commencement of the suit.

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Judgment accordingly.

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July 7.

SMITH, Clerk, &c. v. BELL, Clerk, &c.

By an act of the 4 & 5 Vict. c. cxlii, trustees were appointed for the purpose of the more effectual drainage, by means of a steam-engine, of a fen district in Lincolnshire, called the Bourn North Fen and the Dyke Fen; and by the 62nd section, it was enacted that every engine, machine, building, and work, to be erected and made by the trustees under the powers of the act, and all engines, machinery, buildings, &c., sewers, drains, watercourses, &c. &c., and other works already made,

THIS was an action tried at the last assizes for the county of Leicester, before Lord *Abinger*, C. B., in which a verdict was taken by consent for the defendant, subject to the opinion of the Court on the following case:—

The case first set out the pleadings. The declaration was in trespass by the plaintiff, as clerk to certain commissioners, commonly called the Black Sluice Commissioners, appointed and acting under an act of Parliament of the 5 Geo. 3, for draining and improving certain low marsh and fen lands lying between Boston Haven and Bourn, in the parts of Kesteven and Holland, in the county of Lincoln, and another act of the 10 Geo. 3, for amending the former act, and for improving the navigation through the said lands, against the defendant, as clerk to the trustees appointed and acting under an act of Parliament of 4 & 5 Vict., for the better drainage of lands in Bourn North Fen and Dyke Fen, in the manor and parish of Bourn, in the county of Lincoln, and complained of the breaking and entering by the said trustees of certain closes of the commissioners, situate in Bourn Fen and Dyke Fen, parcel of a farm called

or then existing or provided for the drainage of the Bourn North Fen and Dyke Fen, and which should be thereafter made and provided for such purpose, and the right to and property in them, should be and they were thereby vested in the trustees: with a proviso, that nothing in the act contained should extend to or affect any engines, machinery, &c., sewers, drains, watercourses, &c., and other works already made, or then existing or provided for the drainage of the said fens, and then vested in and under the control of certain commissioners, appointed under a former inclosure and drainage act, called the Black Sluice Commissioners. And sect. 64 enacted, that it should be lawful for the trustees, upon any land in Bourn North Fen and Dyke Fen, *not vested in the Black Sluice Commissioners*, to make and erect a steam-engine, with all proper machinery, with proper and convenient buildings, sluices, pits, and other necessary works; and to make and from time to time maintain, repair, and improve, as occasion might require, the sluices, bridges, cuts, sewers, and other works, already or thereafter to be made in, upon, and through the said fens, for effectually draining the same, out of the funds to be raised under the authority of the act, and making compensation for damage.

Held, that the trustees had no power, under this act, to widen a drain under the control of the Black Sluice Commissioners, from the width of eighteen to forty feet, for the purpose of a reservoir, to bring a sufficient supply of water to their steam-engine, thereby cutting away upwards of three acres of the land vested in the commissioners, although such widening was itself an improvement of the drainage; and that they had no power to make any reservoir on the land vested in the commissioners, although the making of a reservoir was necessary to the proper working of the engine for the purposes of the drainage, and none could be made without cutting into some of the banks or drains vested in the commissioners.

the Black Sluice Farm, vested in the commissioners by an Inclosure Act of the 6 Geo. 3, subverting the soil, prostrating the bank of a drain therein, and carrying away earth and soil, &c. The defendant pleaded, that the said act of the 4 & 5 Vict. was made and passed before the first of the said times when, &c., in the declaration mentioned, and that, before and at the time of the making and passing of the said act, all the engines, machinery, buildings, sluices, pits, bridges, tunnels, culverts, cuts, sewers, drains, water-courses, dams, banks, &c., and other works, then already made or then existing or provided for the drainage of the lands called Bourn North Fen and Dyke Fen, comprising the said drain in the declaration mentioned, were and each and every of them was vested in and under the control of the said commissioners in the declaration mentioned, being the commissioners in that act mentioned as the Black Sluice Commissioners; and that the said drain in the declaration mentioned was and is one of the works mentioned and described in the preamble of the act, as works of drainage made under the powers and provisions of the Inclosure Act of the 6 Geo. 3, and was and is a work of drainage made and under the powers and provisions of that act, and was and is situate within the said Bourn North Fen, and was, at the time of the making and passing of the said act of 4 & 5 Vict., one of the interior works for the drainage of the said several fens called Bourn North Fen and Dyke Fen, and a cut or sewer then already made in, upon, and through the said Bourn North Fen. And the defendant further says, that before and at the said several times when &c., in the declaration mentioned, occasion required them the said trustees, for effectually draining and preserving the said Bourn North Fen and Dyke Fen, to improve the said drain, by making the same wider, by divers, to wit, twenty-two feet, than its width was at the time of the making and passing of the said act 4 & 5 Vict., and to make and to add to the said drain a cut of the said additional width, in the

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said bank and closes in which, &c., alongside of the said drain, so as to form with the said drain one entire cut, wider than the former width of the said drain by the said additional width; wherefore they the said trustees did, at the said several times when &c., in the declaration mentioned, according to the provisions of the said act, and in carrying the same into execution, improve the said drain, by making the same wider by the said number of feet, &c. &c., and by making and adding thereto a cut of the said additional width, &c. &c., for so as aforesaid effectually draining and preserving the said last-mentioned fens: and because, at the said several times when &c., in the declaration mentioned, the said trustees could not otherwise than as aforesaid improve the said drain, and make and add the said cut, they the said trustees did, at the said several times when &c., for the purpose of so then improving the said drain, and making and adding the said cut, necessarily and unavoidably break and enter the said closes in which &c., [so proceeding to justify the trespasses.]

Replication, *de injuriâ*.

This action was brought by an order of the Lord Chancellor, to try the legal right of the trustees for executing the act of the 4 & 5 Victoria, in the pleadings mentioned, to widen a certain drain in Bourn North Fen, for the purposes of that act; which drain, by the acts of the 5th and 10th Geo. 3, commonly called the Black Sluice Acts, and the act of 6 Geo. 3, commonly called the Bourn Inclosure Act, and the award made under it, is vested in the Black Sluice Commissioners.

The whole of the lands called Bourn North Fen and Dyke Fen are situate in the parish of Bourn, and comprise above 4600 acres of land, part of an extensive district of low marsh land, consisting of 64,000 acres, under the jurisdiction of the Black Sluice Commissioners, lying between Bourn and Boston Haven, Bourn being the part most remote from the outfall. At the time the act of 4 & 5 Vict. passed, the lands in the Bourn North Fen and

Dyke Fen were very inefficiently drained, the waters frequently, in time of floods, covering the lands, and lying in the former for weeks together, great damage being occasioned thereby. In order, therefore, that the said lands in the Bourn North Fen and Dyke Fen might be more effectually drained, that act of Parliament was passed, but not without great opposition on the part of some of the Level, and the majority of the Black Sluice Commissioners.

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In order to bring a sufficient supply of water to the engine mentioned in the act, and to work such engine, it was indispensable to provide a reservoir or feeder for the engine, which has been done by extending that portion of the drain in question called the Mill Drain (formerly used as a mill or tail drain to a wind engine) from its former width of eighteen feet to the width of forty feet, which would be an increase of twenty-two feet. This increased width would be of itself an improvement to the drainage, quite independently of the engine, though in that point of view it might not perhaps have been necessary to widen it to so great an extent.

The mill drain discharges the water from the said fens direct into the forty-foot drain.

The actual quantity of land taken by the increased width is 3r. 6p., and is taken from a farm vested in the Black Sluice Commissioners. It was impossible to widen this drain, or any other drains in the fens, so as to increase the capacity of it to take off the water, without cutting some bank vested in the Black Sluice Commissioners, because all the drains, banks, engines, and other works of drainage then existing or provided (this drain being one of them) are, by the Black Sluice and Inclosure Acts of Parliament previously referred to, and the award made by virtue of the Bourn Inclosure Act, vested in them. A mode had been suggested by one of the defendant's witnesses, of purchasing land not vested in the Black Sluice Commis-

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sioners, on the contrary side of the road, but the engineer thought that mode not so effectual and more expensive, and it was therefore abandoned. But no reservoir could be made anywhere, without cutting into some of the banks and drains vested in the Black Sluice Commissioners.

The acts of trespass complained of were committed by the trustees of the act 4 & 5 Vict., in the supposed prosecution of their powers under that act, but what has been done to the mill drain does not come under the description of cleansing.

If the Court should be of opinion that the trustees were justified, the verdict is to stand; if they were not, a verdict is to be entered for the plaintiff.

The case was argued on the 28rd of June, by

Hill, for the defendant.—The drainage trustees are justified by the statute of 4 & 5 Vict. c. 113, in the acts they have done in the lands of the Black Sluice Commissioners. The question depends on the construction which is to be put upon several clauses of that statute, especially the 62nd & 64th sections. The statute recites, in the preamble, the Bourn Inclosure Act, 6 Geo. 3, c. 52, and that several engines and works of drainage were made under the provisions of that act, but such engines had become dilapidated and decayed, and were then entirely removed; that the district called Bourn North Fen and Dyke Fen is liable to be greatly inundated, and the means of drainage very imperfect and insufficient, and that the lands in those fens might be more effectually drained, if powers were granted for erecting a steam-engine therein, for facilitating the discharge of the waters out of those fens into the main cut or drain, then called the Forty-Foot Drain, and also to *deepen and improve the interior works* for the more effectual drainage of those fens, &c.: and the statute then proceeds to appoint trustees for these

purposes. Sect. 62 enacts, "that every engine, machine, building, and work, to be erected and made by the trustees under the powers of this act, and every site of the same respectively, and all engines, machinery, buildings, &c. &c., sewers, drains, watercourses, dams, banks, &c., and other works already made or now existing, or provided for the drainage of the said lands called Bourn North Fen and Dyke Fen, and which shall be hereafter made and provided for such purpose, and the right and property to and in the same, shall be and are thereby vested in the said trustees: provided always, that nothing in this act contained shall extend to or affect any engines, machinery, buildings, &c. &c., sewers, drains, watercourses, dams, banks, &c., and other works already made or now existing or provided for the drainage of the said lands called Bourn North Fen and Dyke Fen, at present vested in and under the control of the Black Sluice Commissioners." And sect. 64 enacts, "that it shall be lawful for the trustees, in and upon any land in Bourn North Fen and Dyke Fen, *not vested in the Black Sluice Commissioners*, to make, erect, and build one or more, not exceeding two, good and substantial engine or engines, with all proper machinery, &c. &c., together with all proper and convenient buildings, sluices, pits, and other necessary works; and also to cleanse, as occasion may require, the drains and watercourses in and through the said fens respectively, for the purpose of facilitating and accelerating the drainage of the waters out of the said fens into the Forty-Foot Drain; and also to make, and from time to time support, maintain, amend, repair, and improve, as occasion may require, the sluices, bridges, tunnels, *cuts, sewers, and other works already or hereafter to be made* in, upon, and through the said fens, for effectually draining the same," out of the funds to be raised under the authority of the act, and making full compensation for all damage done in carrying the act into execution. It is subsequently provided, by sect. 74, that private drains, or

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dikes, shall be cleaned and repaired by the several occupiers of the lands to which they belong, but the trustees are to have a control over these also, in case of their default. On the general scope of the statute, therefore, it appears that the trustees had the power to do this act of widening and thereby improving the interior drain. And it is distinctly found in the case, that a reservoir is essential to the working of the steam-engine, and that it could nowhere be made without cutting into the banks of the Black Sluice Commissioners. No power is given to the commissioners to *sell* their land for this purpose; nor have the trustees sought to take any *property* in the land cut through. Neither is it found that they have interfered with the commissioners' land more than was necessary for the purposes of the drainage. The proviso in sect. 62 is relied upon on the other side; but if the literal meaning of that proviso is to prevail, it prohibits the trustees from doing that very thing which it is the whole object of the act that they shall do, namely, improve the interior drainage of the fens. That proviso, therefore, in order to give to sect. 64 its intended operation, ought to be construed only as preventing the trustees from taking any *property* in the works already vested in the Black Sluice Commissioners, although they were equally subjected to the control and interference of the trustees for the purposes of the act. The effect of the proviso is to qualify the previous part of that section, which vests in the trustees the property, as well in all the works *already made and provided* for the drainage of the fens, as those which shall thereafter be made and provided for that purpose. Suppose power were given to widen a natural brook—there would not thereby be any change in the ownership of the land; it only becomes land covered with water; and as to the difference in value, there is a provision for compensation. But if the proviso is necessarily repugnant to the other parts of the act, the latter clauses must prevail: *Attorney-*

General v. Chelsea Water Works Company (a); *Rex v. Justices of Middlesex* (b). And loose general words like these ought not to be permitted to control specific and plain enactments, so as to render them nugatory.

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R. C. Hildyard, contra.—The words of these sections ought to be construed with reference to what appears on the face of the act of Parliament itself, and not with reference to what is stated in the case. The words of the proviso in sect. 62 are plain and definite, that nothing “*in this act contained*” shall extend to any of the works vested in the Black Sluice Commissioners. But for the proviso, the clause itself clearly would have affected their rights; and therefore it is there that the protecting proviso would naturally be introduced. It is in the same terms and co-extensive with the enacting part of the clause; and it is submitted that the clear intention of the legislature was thereby to exempt altogether from the operations of the act all the drains and other works of the Black Sluice Commissioners. A different rule of construction is applied to *public* and to *private* acts of Parliament. “A statute made *pro bono publico* shall be construed in such manner that it may, as far as possible, attain the end proposed. . . . All statutes made for the convenience of the public ought to have a liberal construction,—to be expounded largely, and not with restrictions:” Dwaris on Statutes, 722; see *Rex v. Inhabitants of Stoke Damarel* (c), *Rex v. Inhabitants of Ramsgate* (d), *Rex v. Inhabitants of Barham* (e). But “private acts, conferring new powers of a special nature on particular persons, affecting the property of individuals, should receive a strict interpretation” as against them: Dwaris, 750; *Blakemore v. Glamorganshire Canal Com-*

(a) Fitzgibbon, 195.

(b) 2 B. & Adol. 818.

(c) 7 B. & Cr. 563; 1 Man. &

R. 458.

(d) 6 B. & Cr. 712; 9 D. & R.

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(e) 8 B. & Cr. 99.

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pany (a), Lee v. Milner (b), Kemp v. London and Brighton Railway Company (c). It is argued on the other side, that the proviso in sect. 62 is to be read as applicable to the *property* in the land, and as a limitation only of the previous part of the same clause, as if it were, "nothing in *this clause* contained shall extend to divest the Black Sluice Commissioners of their property in any of the works," &c. That can only be by an entire alteration of its words. And it surely will not be permitted to defeat the plain words of the act of Parliament by extrinsic facts shewn to the Court, not appearing on the face of the act itself. It is not like the case of a public act, which originates with the legislature itself and not with private persons, and in which it may be presumed that the legislature will introduce nothing inconsistent with its own declared intention. The promoters of a private act, who have allowed such a clause to be inserted, and thereby perhaps got rid of an opposition which would otherwise have been fatal to the act, cannot afterwards call upon the Court to limit its plain words. That the legislature intended fully to protect the property and rights of the Black Sluice Commissioners is plain, even from the 64th section, which has an express prohibition against the trustees constructing engines or other works upon their land. Non constat that the legislature was guilty of any inconsistency in admitting the proviso; the alleged inconsistency is shewn only by the facts stated in the special case, which might never have been brought to their knowledge. [*Parke, B.*—It may well be, that notwithstanding this clause, they have power to discharge their water into the main drain.] Yes; the proviso does not apply to the main drain at all, but only to the interior drains in the Bourn North Fen and Dyke Fen.

Then with respect to section 64; the argument on the

(a) 1 Myl. & K. 154.

(c) 1 Railway and Canal Cases,

(b) 2 Y. & C. 618; S. C. 2 M. 495.

& W. 824.

other side in effect is, that because the trustees cannot make a reservoir without contravening sect. 62, they have a right so to make it as expressly to contravene sect. 64. And it is to be observed, that *drains* are not enumerated in that section at all, though they are in the 62nd. The compensation clause is not applicable to lands *compulsorily taken*, but only to damage incidentally done in making any of the works thereby authorized. The intention of the legislature clearly was to protect the lands and works of the Black Sluice Commissioners to the fullest extent, except so far as they were consenting parties.

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Hill, in reply.—The authorities cited on the other side are not disputed; but they have relation to the case where there is an inconvenience in carrying out the plain words of an act of Parliament, where there are no other repugnant words in the act. Here the question is whether the two enactments are not inconsistent on the face of the act itself; if so, one or the other must give way. Now, the 64th section clearly gives the trustees powers over all the works already made through the fens, including therefore the works of the Black Sluice Commissioners. That is directly inconsistent with the proviso in section 62, and if taken according to their strict and literal interpretations, they cannot stand together. The most reasonable qualification of the words of the act is, therefore, to read the proviso as a limitation on that section only, instead of on the whole act. [*Parke*, B.—Supposing that to be so, is there not a great difficulty on section 64? If the trustees cannot construct the engine on the land of the Black Sluice Commissioners, can they alter the drain in the land merely for the purpose of making a feeding sluice for the engine?] The widening of the drain is not one of the works accessorial to the engine, contemplated by sect. 64; it is not properly an adjunct to the engine, any more than a stream on which a mill is placed. But further, the

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trustees are not taking the land *as their own*, or so as to deprive the commissioners of the use of it. [*Parke, B.*—The case finds that you have taken more than would have been strictly necessary for the improvement of the drainage.]

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The opinion which the Court has formed, after a full consideration of this case, is, that the plaintiff is entitled to our judgment.

The question arises on the construction of the 4 & 5 Vict. c. cxiii, the provisions of which are, at first sight, apparently inconsistent; but we think that they may be reconciled, and that, according to the fair interpretation of the act, the Bourn Drainage Trustees have no power to interfere with any of the drains and works in that district, previously vested in the Black Sluice Commissioners, except perhaps in a very limited degree, which will be explained; and certainly that they have no power to do what they have done, as stated in the special case.

The act recites the 6 Geo. 8, c. 52, under which the drainage works in the Bourn North Fen and Dyke Fen were vested in the Black Sluice Commissioners; it recites also, that engines and works of drainage were made under that act, but that the engines were dilapidated and had been removed, and that the means of drainage for the fen were very imperfect and insufficient: that the lands in those fens might be more effectually drained, if powers were given to erect steam-engines, to discharge the waters into the main or forty-foot drain, and also to deepen and improve the interior works, for the more effectual drainage of those fens; and the act then proceeds to appoint trustees for those purposes, and several enactments are made for their government, to which it is not necessary to

advert. The sections which give rise to the question in the case are the 62nd and 64th. [His Lordship read the 62nd section.] The defendant proposes to limit the effect of the proviso, by construing it to defeat the previous clause only, and preserve in the commissioners the property in the works already vested in them, leaving the control over those works to the trustees, as if the proviso had been that nothing in *that clause*, instead of "that act," contained, should extend to or affect the works already vested in the commissioners; a somewhat singular provision, if it were intended to give the trustees the control and management of them. The plaintiff, on the other hand, contends that the true construction of the proviso is according to the ordinary and grammatical sense of the words, and that it exempts all the works vested in the commissioners altogether from the operation of every part of the act: and this we think is the true interpretation of the clause. Undoubtedly it is, according to one of the established rules of construction, to be so read, unless being so read it would be absurd, or inconsistent with the declared intention of the legislature, to be collected from the rest of the act. At first sight the proviso, so construed, would seem inconsistent, but on a further examination it is not; and it is unquestionably the duty of the Court to reconcile, if possible, the various enactments of the statute, which we think may be done, and with little, if any, modification of the language of any part of it. Adopting the grammatical construction, and supposing that the trustees have no power in any way to meddle with the drains and works vested in the Black Sluice Commissioners, they may still have all necessary powers to make the necessary drainage effectual, so far as appears on the face of the act itself. They are authorized to make fresh drains and water-courses, and other works, and have thus the power of deepening and improving the interior works of drainage *generally*, so as to come within the meaning of the preamble,

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The words of the 62nd section would be satisfied, by supposing that the legislature meant to vest in the trustees all works then already constructed, *if there should be any*, by the trustees themselves, or by other persons than the commissioners; and who shall say that the legislature did not contemplate such a case? and then the proviso is rendered quite consistent with the clause itself. So the power in the 64th section, to cleanse drains and water-courses, may be explained by referring it to any other drains that may exist, even private drains, if occasion required for the general benefit of the drainage: and the power to improve sluices, bridges, &c., already made, may be explained in the same way. Authority is given to make, as occasion may require, new sluices, bridges, tunnels, &c., and to amend and improve them; and such being the principal object of the power, any existing *sluices* and *drains* that there may be (so always that they do not belong to the Black Sluice Commissioners) are included for the sake of caution.

Thus the whole act is, on the face of it, rendered consistent. Ample powers are given to the drainage trustees, and all the works and the drains of the Black Sluice Commissioners in the Bourn North Fen are continued in them, with all the powers belonging to them by their acts of Parliament, unimpaired and unaffected by the enactments of this, in conformity with the clear and positive language of the proviso.

But then it is said, if the proviso should be so construed, the trustees could not carry the act into effect at all, because they could not interfere with the main or forty-foot drain, which is already vested in the commissioners, by discharging the water into it. It appears to us to be a sufficient answer to say, that the proviso ought to

be construed as affecting and limiting the *general* expressions in the act, but not the express and positive authority given by it to use the main or forty-feet drain, which power it is the object of the act to give; and it does not appear on the special case, that any part of that drain is in the Bourn North Fen, to the interior drainage of which alone the act applies.

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Thus, on the face of the act itself, the whole is rendered sensible and consistent. But it is argued, that on the facts stated in the special case, it would be impossible to carry into effect the acknowledged object of the act, the erection of a steam-engine to drain the Bourn North Fen, without interfering with the works of the commissioners; for a reservoir is found to be "essential to a steam-engine," and that, it is found, "could not be made *any where* without cutting into some of the banks and drains vested in the commissioners."

It may however be well doubted, whether, if the act on the face of it be consistent, and gives no power to interfere with the banks and drains vested in the commissioners, Parliament are to be supposed to have given such a power, because, from something that does not appear on the face of the statute, from peculiar local circumstances, which may never have been known to the legislature, the trustees, without such power, could not carry its enactments into effect. Are we not to infer, that the legislature granted the authority which the trustees possess, under the impression that it would not in any way interfere with the rights of the commissioners, which are expressly protected; and can we say that Parliament would have granted it at all, if the fact had been disclosed, that the authority could not be exercised without such interference? And if the act, in consequence of local peculiarities, becomes incapable of being carried into effect, is it not reasonable that the petitioners for it should suffer for their default, rather than those whose interest it is expressly provided shall be saved

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harmless? But even supposing that such a power was given, it could only be given to the extent of authorizing such interference with the property of the commissioners as was absolutely necessary for carrying the same into effect: that is, the reservoir ought to have been constructed so as to require as little cutting as might be through the banks of the drains, and more has certainly been done in this case.

We think, therefore, that the trustees were not authorized to enlarge the drain at all, by virtue of the powers of this act, it not being found to be absolutely necessary for the construction of a reservoir, but the contrary.

Whatever doubt we may have entertained on this part of the case, we do not feel any on the question as to the trustees having violated the act of Parliament, in the mode of constructing the steam-engine and its reservoir. By the 64th section, they are to construct the steam-engine, its pits and sluices, on *other land than* that which belongs to the commissioners, a provision which strongly confirms the opinion that the legislature intended to leave them wholly unaffected by the act, except so far as they would be by the pumping of the water, and also by its passage along the main drain. Now supposing that the trustees had the power of widening and improving the drains vested in the commissioners, for the general improvement of the drainage of the North Bourn Fen, and the communication with the main drain, they had no power to take land *of the commissioners*, for the purpose of making a *sluice* for each steam-engine. It appears by the special case that they have done so; and as it does not find that all they took *was necessary* for the improvement of the drainage, they were not justified in the act done.

The verdict is to be entered for the plaintiff, with 40*s.* damages.

Judgment for the plaintiff.

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LEAF and Others v. TUTON.

ASSUMPSIT for goods sold and delivered, and on an account stated. Pleas, first, as to the sum of 5*l.* 16*s.* 6*d.*, parcel of the monies in the declaration mentioned, payment into Court of that sum, with a traverse of the plaintiffs' having sustained damages to a greater amount in respect of the causes of action in the introductory part of the plea mentioned; secondly, as to the residue of the declaration, non assumpsit; thirdly, as to the sum of 84*l.* 15*s.*, parcel of the monies in the said residue of the declaration mentioned, payment of that sum; and fourthly, as to 35*l.* 8*s.* 6*d.*, parcel of the monies in the said residue mentioned, being parcel of the monies in the first count mentioned, and not being parcel of the sum of 5*l.* 16*s.* 6*d.* in the first plea mentioned, that at the said time when he the defendant became indebted to the plaintiffs in the manner as in the said first count is mentioned, he became indebted to them, so far as relates to the said sum of 35*l.* 8*s.* 6*d.*, upon one entire contract then made between the plaintiffs and the defendant for the sale of parcel of the said goods in the first count mentioned, for a price and value exceeding 10*l.*, to wit, for the price and value of the said sum of 35*l.* 8*s.* 6*d.*; and that the defendant, being the buyer thereof, did not accept and actually receive the said goods in this plea mentioned, parcel as aforesaid, or any part thereof, nor did he give or pay anything in earnest or to bind the bargain so constituted by the said contract, or in part of payment of or for the same goods or any part thereof, nor was any note or memorandum in writing of the said bargain made and signed by the defendant, being the party to be charged by such contract, or by his agent thereunto lawfully authorized.—Verification.

The plaintiff took out of Court the money mentioned in the first plea, took issue on the second, traversed the

To a declaration in assumpsit for goods sold, the defendant pleaded, that at the time when the defendant became indebted to the plaintiff as in the declaration mentioned, he became indebted upon a contract for the sale of the goods therein mentioned, for a price exceeding £10; that the defendant, being the buyer thereof, did not accept nor actually receive the goods or any part thereof, nor give or pay any thing in earnest or to bind the bargain, or in part of payment, nor was any note or memorandum in writing of the bargain made and signed by the defendant or by his agent thereunto lawfully authorized:—*Held* bad on special demurrer, as being an argumentative denial of the contract stated in the declaration.

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payment alleged in the third, and to the fourth demurred specially; assigning for cause of demurrer, that the plea operates as a denial of the contract in the first count of the declaration mentioned, so far as the same relates to the sum of 35*l.* 8*s.* 6*d.*, parcal &c., in that count mentioned, and therefore amounts to the plea of non assumpsit, and should be so pleaded, and is bad as being an indirect and argumentative denial of the contract, &c.—Joinder in demurrer.

The case was argued on a former day of these sittings (June 22), by

Humfrey, in support of the demurrer.—The fourth plea is bad, as being an argumentative denial of the contract alleged in the first count: the cases of *Buttemere v. Hayes* (a), and *Eastwood v. Kenyon* (b), having established that a defence under the Statute of Frauds need not be specially pleaded, but may be given in evidence under the general issue, on the ground that it is a denial of the existence of any contract. In *Prentice v. Elliott* (c), the defendant pleaded to a count for use and occupation, that he held the premises under a demise from the plaintiff at a certain rent payable quarterly, and that, before the rent became due, the plaintiff evicted him from the possession; and this plea was held bad as being an argumentative one, amounting to the general issue. Such defences ought not to be pleaded specially, because it leads to prolixity and complexity of pleading. [*Parke*, B.—In *Maggs v. Ames* (d), a plea that the defendant's undertaking was for the default of another, without writing, and without consideration, was held to be good, although the facts might have been given in evidence under the general issue.] *Lilly v. Hewitt* (e) is an authority directly the other way. [*Parke*, B.—In

(a) 5 M. & W. 456.

(b) 11 Ad. & Ell. 438; 3 P. & D. 276.

(c) 5 M. & W. 606.

(d) 4 Bing. 470; 1 M. & P. 294.

(e) 11 Price, 494.

truth this plea is a mere denial that the defendant ever was indebted at all. *Alderson*, B.—It is in effect, that the defendant is indebted to the plaintiff in 35*l.* 8*s.* 6*d.*, on a contract on which he was not indebted.] If so, it is bad on special demurrer, according to *Prentice v. Elliott*.

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Hoggins, contra.—The plea is good. It does not admit that the defendant was ever *indebted*, but only that the goods were sold and delivered, which *prima facie* raises the liability to pay for them, and then alleges that there is another matter superadded by statute, to make that liability complete, namely, the acceptance of the goods, the giving of earnest, or a memorandum in writing, and that there has been none of these. It confesses and avoids, but sets up matter of law as a defence. *Carr v. Hinchliffe* (a) is an authority that this may be done. [*Parke*, B.—There the plea was not a denial of the contract, because the plaintiff had a good cause of action, unless the defendant chose to avail himself of his right of set-off against the factor.] *Maggs v. Ames* proceeded on the authority of that case. *Park*, J., in delivering the judgment of the Court, says, “The plea, in this case, consists not in denying the plaintiff’s right of action; it is not a denial of the facts in the declaration, but it is matter of defence in law, arising out of the Statute of Frauds.” So here, the plea admits the facts stated in the declaration, but avoids them by shewing that there was no acceptance and no memorandum in writing, these being forms superadded by the statute, without the existence of which the plaintiff cannot succeed. *Lysaght v. Walker* (b) is also an authority to shew that such a plea is not bad, as tendering an issue in law. The plaintiffs may take issue by replying that there is a note in writing, or that the goods were accepted. In *Barnett*

(a) 4 B. & Cr. 547; 7 D. & R. 42.

(b) 5 Bliq., N. S. 1.

Exch. of Pleas, v. Glossop (a), it was held that a defence that there was
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Humfrey, in reply.—There are two questions here: first, does this plea amount to a denial of the contract alleged in the declaration; and secondly, if it does, is it therefore bad? The case of *Barnett v. Glossop* is in effect overruled by the more recent decisions in *Johnson v. Dodgson (c)*, *Buttemere v. Hayes*, and other cases. [*Parke, B.*—No doubt *Buttemere v. Hayes* is at variance with *Barnett v. Glossop*.] It is clear, therefore, that this defence may be given in evidence under the general issue. Non assumpsit is only “a denial in fact of the express contract or promise alleged, or of the matter of fact from which the contract or promise alleged may be implied by law.” [*Alderson, B.*—If you

(a) 1 Bing. N. C. 633; 1 Scott, 621. (b) 5 B. & Ald. 557.

(c) 2 M. & W. 653.

deny the contract of sale by non assumpsit, do not you also deny that which makes it a good contract? In the case of infancy, or coverture, it is a good contract among some persons; in cases within the Statute of Frauds, it is not so as to any persons.] Then secondly, is not the plea therefore bad? In *Lysaght v. Walker*, Lord Tenterden thought such a plea bad, notwithstanding the case of *Maggs v. Ames*. In *Bridge v. Grand Junction Railway Company (a)*, to a count alleging an injury to the plaintiff by the defendants' mismanagement of their train of carriages, whereby it ran against another train in which the plaintiff was, the defendants pleaded a plea, setting up negligence in the management of the latter train; and this was held bad, as amounting to not guilty.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKER, B.—[After stating the pleadings, he continued]:—The case of *Buttemere v. Hayes*, in this Court, decided that the general issue, which, under the new rules, is “a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged is implied by law,” is a denial that the requisites of the Statute of Frauds have been complied with, in cases where the statute applies; and on an issue on that plea, the plaintiff must prove the affirmative. The plea of the non-compliance with the Statute of Frauds is, therefore, nothing but an argumentative denial of the contract, or of the facts from which it is implied by law; and is demurrable on that account. This case differs materially from those in which the contract is avoided by the statute or common law, for some matter which (as the plaintiff is admitted to have a colour of action) is the subject of proof

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infancy, or coverture: an allegation of any of these does not amount to a denial of the contract, but to a confession and avoidance; and these, according to the new rules, must all be specially pleaded. Under the old system of pleading, they were admissible under the general issue, non assumpsit, because the general issue, as then understood, had not the limited operation of denying allegations in the declaration, but amounted to a plea that there was no cause of action, or that, if there were, it had ceased before the commencement of the suit; but they did not *amount* to the general issue, that is, to an unqualified denial of the facts alleged. The case of *Maggs v. Ames* was decided without sufficiently adverting to that distinction: at all events, since the decision in *Buttemere v. Hayes* (which has been confirmed by the Court of Queen's Bench, in *Eastwood v. Kenyon*), that case cannot be supported.

Judgment for the plaintiff.

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PICKFORD and Another v. The GRAND JUNCTION
RAILWAY COMPANY.

July 7.

THIS action came on to be tried at Guildhall on the 3rd day of July, 1841, before Lord *Abinger*, C. B., and a special jury, when, by the direction of his Lordship, and the consent of the parties, a verdict was found for the plaintiffs for 40*s.* damages, subject to the opinion of the Court upon the following case, with liberty to turn it into a special verdict :—

The Grand Junction Railway was made in pursuance and under the authority of the following acts of Parliament, viz., 3 & 4 W. 4, c. xxxiv; 4 W. 4, c. lv; 5 W. 4, c. viii, and 3 Vict. c. xlix, which are to be referred to as part of this case. The London and Birmingham Railway was made in pursuance of and under the authority of the following acts of Parliament, 3 W. 4, c. lv, and 6 W. 4, c. lvi, which also may be referred to as part of this case.

On the 16th November, 1840, the defendants, in pur-

The Grand Junction Railway Company were authorized by their act of Parliament, 3 & 4 W. 4, c. xxxiv, s. 156, to carry and convey upon the railway all such passengers, goods, merchandize, &c., as should be offered to them for that purpose, and to make such *reasonable charges* for such carriage and conveyance as they might from time to time determine on. Sect. 159 authorized the Company also to fix the sums to be charged in respect of small

parcels, not exceeding 500 lbs. weight each. By the 4 W. 4, c. lv, s. 19, they were empowered to carry passengers and goods on other railways, and to make such reasonable charges for such carriage as they should determine on. And by another act, the 3 Vict. c. xlix, s. 28, it was enacted, that the charges by the former acts authorized to be made for the carriage of passengers or goods should be at all times charged *equally*, and after the same rate in respect of all passengers, goods, &c., conveyed or propelled by a like carriage or engine, passing on the same portion of the line, and under the same circumstances.

The Company published a list of rates for the carriage of merchandize, divided into seven classes, of which the lowest was 16*s.* and the highest 60*s.* per ton : and for "boxes, bales, hampers, or other packages, when they contained parcels or other packages or things under 112 lbs. weight each, directed, consigned, or intended for different persons, or for more than one person," they imposed a charge of 1*d.* per lb. weight :—*Held*, that this last was not a *reasonable* charge in the case of a package above 500 lbs. weight, made up by a carrier and directed to one person, although containing a number of parcels under 112 lbs. weight each, consigned or directed to different persons.

The Company also became carriers on the London and Birmingham line, and published a list of charges for the carriage of goods from Manchester to London, among which "Manchester packs" were charged 3*s.* 3*d.* per cwt., or 65*s.* per ton. At the foot of this list was a notice, that "goods were brought to the station at Camden Town without extra charge," and that there was "no charge for booking or delivery in London." The Company made an agreement with C. & H., that the latter should carry from the station at Camden Town and deliver in London all such goods carried by the railway, and for so doing should receive 10*s.* per ton out of the entire charge of 65*s.* per ton :—*Held*, that, under these circumstances, the charge of 65*s.* per ton, when made to any other persons who were ready to receive their goods at the station at Camden Town, was both *unreasonable* and *unequal*.

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suance (as was alleged) of the said acts of Parliament, 3 & 4 W. 4, c. xxxiv, 4 W. 4, c. lv, 5 W. 4, c. viii, and 3 Vict. c. xlix, determined upon and published a list of rates or charges for the conveyance of merchandize, whereof a copy is hereto annexed, marked A. (a). The charges in this list are lower than had ever before been charged for the rapid conveyance of goods by land. Before and at the time of the publication of this list of charges, the defendants, availing themselves of the power given by the statute 3 W. 4, c. xxxiv, s. 156, and 4 W. 4, c. lv, s. 19, were, and from thence have been, under the circumstances hereinafter mentioned, common carriers of goods for hire between Manchester and Birmingham and between Manchester and London, that is to say, using for that purpose the Manchester and Liverpool Railway between Manchester and Newton, the Grand Junction Railway between Newton and Birmingham, and the London and Birmingham Railway between Birmingham and Camden Town, from whence the goods are conveyed to the places of consignment as hereinafter mentioned, by carts and vans. The defendants satisfy the Manchester and Liverpool Railway Company and the London and Birmingham Railway Company for and in respect of the passage over their respective railways of the goods so carried by the defendants, and charge to the public, since the publication of the said list, the prices mentioned therein. The plaintiffs have for many years been and still are common carriers of goods for hire between Manchester and Birmingham, and also between those places and London, and since October, 1840, have daily employed the defendants as such carriers as aforesaid, between the said places, to carry goods

(a) This list divided the "rates by merchandize trains" into seven classes of charges, the lowest being 16s. and the highest 60s. per ton. Then followed — "Boxes, bales, hampers, or other packages, when

they contain parcels or other packages or things under 112 lbs. weight each, directed, consigned, or intended for different persons, or for more than one person, 1d. per lb. weight."

for them between those places in parcels of above 112 lbs. weight each. They have also, since the same date, daily delivered to the defendants one or more parcels (as the case might be) under 112 lbs. each, and which in the trade are commonly known by the name of "smalls," to be carried between the same places, and for which latter parcels the plaintiffs have paid the defendants according to the rate fixed in the said published list, under the title of "smalls." The plaintiffs charge to their customers various rates for the carriage of their goods, according to the quality, quantity, and value of such goods. The revenue derivable from the carriage of small parcels has always been regarded and calculated upon by the defendants and all other railway companies, as formerly also by stage-coach and van proprietors, and all carriers by rapid conveyances, as a very large, important, and valuable item of profit, and a large and extensive establishment of clerks, horses, and vans is requisite for the express and special purpose of conducting such small-parcel business efficiently and conveniently.

On the 24th November, 1840, the plaintiffs had in their possession, as carriers between Manchester and Birmingham, several parcels of goods, consisting of teas, books, and hardware, which had been delivered to them by various persons to be carried to Manchester. On the same day, the plaintiffs caused the said several parcels to be packed in a hamper, the gross weight of which and of the parcels contained in it was 8 cwt. 8 qrs. 0 lbs., although each parcel separately was less than 112 lbs. weight, and would (if delivered separately) have been a small parcel, and have fallen under the title of "smalls," according to the list of prices before mentioned. On the same day, the plaintiffs caused the said hamper and its contents aforesaid to be tendered to the defendants, as common carriers as aforesaid, at the place used by them at Birmingham for carrying on their said business of common carriers, and there required the defendants to carry the same and its contents from Bir-

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tingham to Manchester for them the plaintiffs, and the plaintiffs then offered to pay for such carriage the sum of 1*l.* 6*s.* 6*d.*, being at the rate of 60*s.* per ton. The defendants' agent and manager at Birmingham, to whom the said hamper was tendered, was the duly authorized agent of the defendants for the management and carrying on of their said business at Birmingham, and he did not at the time of such tender know the contents or the value, or the nature of the contents, of the said hamper, and so informed the person tendering the same, who, on being asked the contents, said they were "smalls," thereby meaning (as both parties understood) parcels each under 112 lbs. weight, consigned or intended for different persons, and within the description sought to be charged for by the defendants in the said list of charges, either at one penny per pound weight on the gross weight of the hamper and its contents, or at the usual small-parcel price for such parcel therein contained: whereupon the defendants' agent refused to receive or carry the said hamper and its contents according to the request of the plaintiffs, unless they allowed the hamper to be opened, so that the number of parcels contained therein might be known, and each parcel contained in the said hamper charged and paid for separately at the rate fixed in the said list, or unless they would pay the defendants for the carriage of the said hamper and its contents at the rate of one penny per pound upon its weight of 8 cwt. 3 qrs., which would have amounted to 4*l.* 1*s.* 8*d.* The plaintiffs refused to pay for each parcel separately, or to pay one penny per pound upon the gross weight of the hamper and its contents, and the defendants refused in consequence to carry the hamper. The said hamper was in a convenient form for the purpose of carriage, and was as capable of being conveyed by the defendants as any other parcel of the same weight, and no objection was made by the defendants to carry it upon any ground of inconvenience by reason of the weight or size of

the hamper, or the nature of the contents, or upon any other than as aforesaid. The said hamper was duly directed to Pickford & Co., Manchester, where the plaintiffs have a place of business as common carriers, under that name. The sum of 1*l*. 6*s*. 6*d*., which was tendered, was the full amount the defendants were entitled to demand and receive for the receipt and carriage of the said hamper and its contents, and for all other charges, unless they were entitled to charge for each parcel contained in the hamper separately, or to charge one penny per pound on the gross weight of the hamper and its contents.

On the 5th day of December, 1840, Pickford & Co., as such carriers as aforesaid, had in their possession at Manchester several parcels of cotton, linen, and woollen goods, which had been delivered to them by various persons, to be carried by them to various persons at Birmingham. On the same day the plaintiffs caused the said several parcels to be packed in a hamper, the gross weight of which, and the parcels so contained in it, was 6*cwt*. 2*qrs*. 10*lbs*., although each parcel separately was less than 112*lbs*. weight, and would (if delivered separately) have been a small parcel, and fallen under the title of "smalls" according to the list of prices before mentioned. On the same day, the plaintiffs caused the said last-mentioned hamper and its contents as aforesaid to be tendered to the defendants, as common carriers as aforesaid, at the place used by them at Manchester for carrying on their said business of common carriers, and then required the defendants to carry the same and its contents to Birmingham for them the plaintiffs, and the plaintiffs then offered to pay for such carriage the sum of 9*s*., being at the rate of 25*s*. per ton. The defendants' agent and manager at Manchester, to whom the said last-mentioned hamper was tendered, and who was duly authorized by the defendants as aforesaid at the time of such tender, did not know the contents or the value, or nature of the contents of the said last-mentioned

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hamper, and so informed the person tendering the same as aforesaid; and the person tendering the same, on being asked the contents, said, "They are small parcels of cotton, and linen, and woollen goods," thereby meaning (as both parties understood) parcels under 112 lbs. weight consigned or intended for different persons, and within the description sought to be charged for by the defendants in the said list of charges at one penny per pound weight of the gross weight of the hamper and its contents, or at the usual small-parcel price for each parcel therein: whereupon the defendants' agent refused to receive or carry the said last-mentioned hamper and its contents according to the requisition of the plaintiffs, unless they allowed the said last-mentioned hamper to be opened, so that each parcel contained therein might be charged and paid for separately at the rate fixed in the said list, or the plaintiffs would pay the defendants for the carriage of the said last-mentioned hamper and its contents at the rate of one penny per pound upon the said gross weight of 6cwt. 2qrs. 10lbs., which would have amounted to 8*l.* 1*s.* 6*d.* The plaintiffs refused to pay for each parcel separately, or pay one penny per pound upon the gross weight of the hamper and its contents, and the defendants in consequence refused to carry the said last-mentioned hamper. The said last-mentioned hamper was in a convenient form for the purpose of carriage, and was as capable of being conveyed by the defendants as any other parcel of the same weight, and no objection was made by the defendants to carry it upon any ground of inconvenience by reason of the weight or size of the hamper or of the nature of its contents, or upon any other ground than aforesaid. The said last-mentioned hamper was duly directed to Pickford & Co., Birmingham, where the plaintiffs have a place of business as such common carriers, under that name. The sum of 9*s.*, which was tendered, was the full amount the defendants were entitled to demand and receive for the receipt and carriage of the

said last-mentioned hamper and its contents, and for all other charges, unless they were entitled to charge for each parcel contained in the said hamper separately, or to charge one penny per pound on the gross weight of the hamper and its contents.

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Messrs. Chaplin & Horne, as well as the plaintiffs, have for many years been common carriers of goods for hire between London and divers other parts of the country, and both of them have for a long time used the said London and Birmingham Railway to a large extent for the conveyance of goods entrusted to them respectively, as well from Camden Town to Manchester as from Manchester to Camden Town. The London terminus of the goods department of the London and Birmingham Railway is at Camden Town, in the suburbs of London, and as well the plaintiffs as Messrs. Chaplin & Horne have, by arrangement with the London and Birmingham Railway Company, separate warehouses and places of business contiguous to each other, and within a few hundred yards of the said terminus, and together forming a part of the station or place of business of the London and Birmingham Railway, and respectively connected by branch lines of railway with the main line thereof. On arrival at the aforesaid terminus of the London and Birmingham Railway, the London and Birmingham Railway Company forward the goods conveyed for the plaintiffs, or the defendants, or Chaplin & Horne, from Manchester or Birmingham, by horse-power along the several branch lines of railway running out of such main line, to as near the said warehouses of the plaintiffs and Messrs. Chaplin & Horne respectively as they conveniently can, and there leave the same for those parties respectively, under the charge and at the risk of those parties respectively, who afterwards receive the goods into their respective warehouses, and from thence send them by carts and vans to the various places to which they are directed or consigned.

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The London and Birmingham Railway Company supply the trucks and locomotive power for the conveyance of the goods from Birmingham to Camden Town, and from Camden Town to Birmingham, and charge, as well to the plaintiffs as to the said Messrs. Chaplin & Horne, and all other parties using their railway for the conveyance of goods, a certain amount per ton for tonnage, varying according to the description of goods, and which, for the description of goods hereinafter mentioned, was, during the time hereinafter mentioned, 23*s.* 4*d.* per ton; and they also charge 12*s.* per ton for the use of their locomotive power, which includes the use of the trucks.

In the month of June, 1840, the defendants entered into an agreement with Messrs. Chaplin and Horne, a copy of which is left herewith, and either party is to be at liberty to refer to it (a). That agreement was acted upon between the parties thereto; and in pursuance of it, goods collected at Manchester by the defendants, as common carriers from thence to London, are sent by them along the Manchester and Liverpool Railway, the Grand Junction Railway, and the London and Birmingham Railway, to Chaplin & Horne, at their said warehouses or places of business near the Camden Town terminus of the London and Birmingham Railway Company; and Messrs. Chaplin & Horne are debited by the London and Birmingham Railway Company for the rates due to them in respect of the carriage of the said goods upon their railway. Messrs. Chaplin & Horne then, by means of carts and vans, convey the said goods to the respective consignees thereof in London and its vicinity, making out in their own names, as principals, to the consignees of such goods, the bills for the entire carriage

(a) By this agreement, in effect, the Company stipulated to allow Messrs. Chaplin & Horne the sum of 10*s.* per ton, out of the entire charge of 65*s.* per ton, for carrying

the goods to and from the station at Camden Town, and delivering them at any place within the limits of the London Portage Act.

thereof from Manchester, which they receive and account for to the defendants, first deducting for their own profit or remuneration the sum of 10*s.* per ton, as provided for in the agreement.

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On the other hand, in pursuance of the same agreement, Messrs. Chaplin & Horne, having collected in London, in their own name, and on their own responsibility, goods to be conveyed by them as common carriers to Manchester, bring the same to the said terminus at Camden Town, and then transmit them by the said London and Birmingham Railway as far as Birmingham, on trucks, with covers thereon, belonging to the defendants, and marked G. J. R. W. (being the initials of the defendants). At Birmingham they are taken charge of by the defendants, who remove them by a railway communication of their own from the terminus of the London and Birmingham Railway to their own terminus, and then forward them to Manchester by the Grand Junction Railway and the Manchester and Liverpool Railway, and the charge for the entire carriage from London to Manchester is received from the respective consignees by the defendants or their agents at Manchester.

In the month of January, 1841, the defendants determined on and published a new list of rates for the conveyance of goods, in alleged pursuance of the said acts of Parliament; of which list a copy is hereunto annexed, marked B. (a). Those rates, for example the rate of 8*s.* 3*d.* per cwt. or 65*s.* per ton for the carriage of Manchester packs, being the description of goods hereinafter mentioned, include the conveyance of the goods from Manchester to the said terminus of the London and Birmingham

(a) By this list, the charge for the carriage of "Manchester packs," from Manchester to London, was stated to be 3*s.* 3*d.* per cwt., or 65*s.* per ton. At the foot of the list was the following:—"Goods brought to the station at Camden Town without extra charge. No charge for portage and delivery in London."

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ham Railway at Camden Town, and the conveyance of them thence along such branch line of railway towards or to the said warehouses or places of business of the said Messrs. Chaplin & Horne near to such terminus, and the further conveyance or delivery of the goods from thence by the said Messrs. Chaplin & Horne to or at the various places to which they are directed, if within the limits of delivery as fixed by the London Portage Acts, including the London Docks, which are five miles distant from the said terminus.

In like manner, the plaintiffs and several other carriers have adopted the plan of charging one undivided sum only for carriage from Manchester, and delivery at the places in London to which the goods are directed or consigned, without making any separate claim for portage or delivery. The expense for conveying goods from the said warehouses at Camden Town and delivering them within the limits aforesaid, amounts to a sum varying from 5*s.* to 8*s.* per ton. The said charge of 3*s.* 3*d.* per cwt. or 65*s.* per ton, in the said last-mentioned lists of rates, for the carriage of Manchester packs, is less than ever was before charged for the rapid conveyance of such kind of goods from Manchester to London or its suburbs, whether exclusive or inclusive of the charge for delivery. That charge, and none other, has from the time of the publication of the said last-mentioned list been always made by the said defendants, or Messrs. Chaplin & Horne, for the carriage of such goods from Manchester, whether the goods have been conveyed by vans or carts from the warehouses of Messrs. Chaplin & Horne, and by them delivered to the consignees, at any place within the limits of the London Portage Acts, or whether (at the request of the consignees) the goods have been delivered to them at the said terminus at Camden Town; and the same course has been pursued by the defendants, or by Messrs. Chaplin & Horne, in regard to the charge for all the other description of goods specified

in the said last-mentioned list of rates. The plaintiffs have always refused to pay such charge of 65*s.* per ton, as an unreasonable charge for the conveyance of such goods from Manchester to London, they being ready to receive the goods at the said terminus of the London and Birmingham Railway, and to carry away the goods from thence themselves.

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On the 16th day of February, 1841, the plaintiffs had in their possession, as carriers, a Manchester pack, (being a package of cotton and woollen goods), weighing 7 cwt. 2 qrs. 17 lbs., which had been delivered to them to be conveyed to London, and on the same day they caused the said pack to be tendered to the said defendants, as common carriers as aforesaid, at their place of business at Manchester, and required them to receive and convey the said pack of goods for them from Manchester, according to the terms of the following letter:—

“ London, 16th February, 1841.

“ Gentlemen,

“ Our agent, Mr. Robert Moseley, has our instructions to tender to you the goods sent herewith and specified below, for conveyance by you as common carriers. They are intended for our London house, and are to be delivered to them at our place of business at the terminus in Camden Town. Mr. Robert Moseley has instructions to offer you, at the same time, the highest price for the carriage thereof which you are in the habit of charging to all persons for the carriage of similar goods, deducting therefrom the allowance which you are in the habit of making under similar circumstances to Messrs. Horne & Chaplin, or to any other persons. Believing that 65*s.* per ton is the sum charged by you for similar goods, when delivered to the consignee within the city of London or elsewhere, and 10*s.* to be the allowance made thereout to Messrs. Horne & Chaplin, or to other persons, when the same are delivered

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at the terminus in Camden Town, we have instructed Mr. Robert Moseley to offer you the sum of 55*s.* per ton for the carriage of the goods sent herewith. Our intention, however, is to offer you precisely the same sum which you receive from Messrs. Horne & Chaplin, or from other persons, for the conveyance of the same weight of similar goods under the same circumstances; and if we are under any misapprehension as to the amount, we request your correction in this respect, to which Mr. Robert Moseley has our instructions to attend, and will pay the right amount according to the same.

“And in order to prevent any possibility of misconstruction, we beg to say, that we are willing to consign these goods as Messrs. Horne & Chaplin or other persons consign theirs, and to deal with the same in all respect as Messrs. Horne & Chaplin, or other persons, deal with theirs, when the same are intended to be delivered at the terminus in Camden Town; and to afford you, as carriers over the lines of railway between this place and Camden Town, every facility or advantage which Messrs. Horne & Chaplin, or other persons, afford you in that behalf; and in short, we are willing, and we hereby require, to be placed from time to time and in all respects under similar circumstances with them, and that you shall carry our goods at the same reasonable charge as you carry theirs.

“We are, Gentlemen,

“Your obedient servants,

(Signed) “PICKFORD & Co.”

“To the Grand Junction Railway
Company, Manchester, per
Robert Moseley.”

The plaintiffs were then, and also at the time of the commencement of the present suit, ignorant of the precise terms of the said agreement between the defendants and Messrs. Chaplin & Horne, but they were aware that

some kind of agreement had been entered into between those parties. *Exch. of Pleas, 1842.*

The plaintiffs were then ready and willing to pay, and tendered to the defendants payment for the carriage of the said pack, upon the terms mentioned in the said letter.

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The defendants replied to the said letter, and the requisitions therein made, that 65*s.* per ton was their charge to all persons for such goods as were then tendered to them for carriage, and that upon payment of such charge, they would receive the said pack, and carry and deliver it at Camden Town, or any other place in London to which it was directed or consigned, but that they would not carry it at any lower charge.

The plaintiffs refused to pay at the rate of 65*s.* per ton, and the defendants in consequence refused to carry the pack.

The Court is to be at liberty to draw from the above facts any conclusion which, in their judgment, a jury ought to have drawn.

The questions for the opinion of the Court are—

1st.—Whether the defendants were by law bound to carry the hamper and its contents first above mentioned from Birmingham to Manchester, at the rate or for the sum of 1*l.* 6*s.* 6*d.*

2nd.—Whether the defendants were by law bound to carry the hamper and its contents secondly above mentioned from Manchester to Birmingham, at the rate or for the sum of 9*s.*

3rd.—Whether the defendants were entitled by law to charge at the rate of 65*s.* per ton, for the carriage of the pack of goods thirdly above mentioned, from Manchester to Camden Town.

The verdict on the several issues is to be entered in such manner and form as to the Court shall seem proper, it being agreed, that in the event of the plaintiffs being

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held entitled to the judgment of the Court on any of the counts of the declaration, then the damages are to be entered and assessed at the sum of 40s.

The case was argued on the 2nd of July (*a*), by

Martin, for the plaintiffs.—The proper construction to be put on acts of Parliament of this nature is now well understood, and is clearly pointed out by Lord *Eldon* in *Blakemore v. Glamorganshire Canal Company* (*b*), and by *Alderson*, B., in *Lee v. Milner* (*c*). In the latter case the learned Judge lays it down that “the stipulations contained in acts of this sort are in the nature of *conditions*, and the legislature confers those privileges on such companies, on the condition that they shall obey the different enactments contained in the different acts with reference to them.” Now, the main ground upon which this and other railway companies obtained these powers from the legislature, was the giving increased speed and increased cheapness in the conveyance of goods and passengers throughout the country. This they have undoubtedly done; and the result has been that they have obtained the sole and exclusive carriage of both passengers and goods on every line of road on which they have been established. But it clearly was not the intention of the legislature to confer upon this company the exclusive carriage of either passengers or goods. Probably all that was originally contemplated by the parties themselves was, that they should afford to the public an improved line of road, which should be used by them in the same manner as canals are used, and not that the company should themselves become the exclusive carriers; but from the risk in the management of locomotive engines, it has been found in practice that

(*a*) Before *Parke*, B., *Alderson*,
B., and *Gurney*, B.

(*b*) 1 Myl. & K. 162.

(*c*) 2 Y. & C. 618.

the proper regulation of them requires the sole control and superintendence of one body, and the railway companies have in consequence obtained an entire monopoly, not merely of the railway itself, but also of the traffic upon it, as well in the carriage of passengers as of goods. The rates of tonnage and tolls given by their first act, 8 & 4 Will. 4, c. xxxiv, ss. 154, 155, are clearly founded on this idea, that parties were to use their own carriages and their own locomotive power upon the railway, and that the company were to be entitled to a *tonnage* for the use of the line of road, in the same manner as canal companies receive a tonnage for the carriage of goods along the canal. Then s. 156 empowers the company, "if they shall think proper, to use and employ locomotive and other engines, or other moving power, and in carriages and wagons drawn and propelled thereby, to carry and convey upon the said railway all such passengers, cattle, goods, wares, and merchandize, articles, matters, and things as shall be offered to them for that purpose, and to make such *reasonable charges* for such carriage and conveyance as they may from time to time determine upon, *in addition* to the several tonnages and tolls hereinbefore authorized to be charged and received; provided, that neither the said company, nor any other person or persons using the said railway as carriers, shall ask, demand, or be entitled to take (both for tolls and carriage) any greater sums than the following," i. e. certain sums *per mile* for each person conveyed. Then s. 158 gives the company a very extensive and vague power. It enacts, "that it shall be lawful for the said company, and they are thereby empowered, to provide locomotive engines or other power for the drawing or propelling of any articles, matters, or things, persons, cattle, or animals upon the said railway, and to receive, demand, and recover such sums of money for the use of such engines or other power as the said company shall think proper, in addition to the several other rates,

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tolls, or sums by this act authorized to be taken." And s. 159 empowers the company, at any general or special meeting, and also the directors, "from time to time to make such orders for fixing, and by such orders to fix, the sums to be charged by the said company *in respect of small parcels* (not exceeding 500 lbs. weight each) as to them shall seem proper." The 158th section has reference to the hiring of locomotive power from the company, and does not affect the question in the present case, which depends on the 156th and 159th taken together. And it is submitted, first, that the goods mentioned in this case were not *small parcels* within the meaning of s. 159.

It is plain that this clause was introduced for the purpose of allowing the company to make a charge for the carriage of small parcels of value, such as bankers' and solicitors' parcels, jewellery, &c., for which a charge by weight would not afford a reasonable remuneration. But where a package is delivered to them above 500 lbs. weight, in a convenient and proper form for carriage, which will afford them a proper remuneration for the carriage *upon the weight*, that clearly does not fall within this section. Small parcels are of necessity more liable to pilferage and loss, and require much more care and attention, than large ones; and it was reasonable in respect of them to give the company the power of requiring a due and proper compensation. Nor can it be answered, that a number of very valuable parcels might be put up in one large package, and so a vast amount of responsibility cast upon the company; because in respect of all articles of intrinsically large value, they are amply protected by the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 65.

The parcel in question, therefore, not being within s. 159, the case turns on s. 156, upon which the question is, what is a *reasonable charge*? Now, can it possibly be *reasonable*, that for a package of cotton goods, made up in the most convenient way for carriage, containing seven or

eight separate parcels of cotton goods, but to be delivered at one single place, and therefore causing to the company no greater expense or trouble than if all the parcels were for the same person, the sum of 3*l.* 1*s.* 6*d.* should be charged, whereas for the very same article consigned to one person the charge is 9*s.* only? It is obvious, that if this can be maintained, it gives the railway company a complete and entire monopoly of the entire small parcels' carriage from Liverpool to Birmingham, which is stated in the case to be productive of an immense revenue. Surely the charges set forth in their own list of rates must, as against them, be assumed to be reasonable charges,—the highest class of which is 60*s.* per ton; whereas upon "boxes, bales, hampers, or other packages, when they contain parcels or other packages, or things under 112 lbs. weight each, directed, consigned, or intended for different persons, or for more than one person," the charge imposed by them is 1*d.* per lb., obviously a most unreasonable rate, and clearly intended to drive all other carriers off their line. Besides, suppose several persons club together, and put up a number of parcels in one package to be sent by a carrier, the carrier cannot know whether every thing contained in it is intended for the one individual to whom it is directed; so that this mode of charging would lead to the practice of opening every package, in order to ascertain whether it might not contain different parcels for different persons.

The other question in the case is, whether the company have a right to make in all cases one charge for the *carriage* and for the *delivery* of goods, although in some cases the consignee may not require them to be delivered. What they say in effect is, that they *will* deliver goods carried by their railway, at any place within the limits of the London Portage Act, and for that *will* charge 65*s.* a ton. But the charge authorized by the act of Parliament to be made by the company, is a charge for carriage *on the line of railway*. They ought to state how much they charge

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for carriage on the railway, and how much for delivery, and each ought to be a reasonable charge. [*Alderson, B.*—It cannot be a reasonable charge for carriage on the railway, if for that they are doing an additional expensive act for other people.] This question also turns on the 156th section, taken in conjunction with certain clauses of later acts. The 4 Will. 4, c. lv, s. 19, extends the provisions of the 3 Will. 4, c. xxxiv, s. 156, and empowers the company to use and employ locomotive or other engines, &c., and in carriages and waggons drawn or propelled thereby to carry and convey, as well upon and along the said railway as upon and along *any other railway or railways*, all such passengers, cattle, goods, &c., as shall be offered to them for that purpose, and to make such *reasonable charges for such carriage or conveyance*, (not exceeding the amounts specified in the said recited act), as they may determine," &c. It is clear this clause confines them to a charge for the carriage and conveyance *upon the lines of railway*, and does not authorize them to combine with it a charge for conveyance from the terminus to the place of delivery in London. Then the subsequent act of 3 Vict. c. xlix, s. 26, provides, that the charges by the former act authorized to be made for the carriage of any passengers, goods, &c. to be conveyed by the company, "shall be at all times charged *equally*, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, &c. of a like description, conveyed and propelled by a like carriage or engine, passing on the same portion of the line only and under the same circumstances." [*Alderson, B.*—Can it be said Pickford & Co. and Mr. Horne are charged *equally*, when they are charged the same sum in the one case for carriage plus portage, as in the other case for carriage alone?] And that, while the rates put forth by the company themselves expressly state, that "goods are brought to the station at Camden Town without extra charge," and that there is "*no charge* for portage and delivery in

London." It is clear, therefore, that the charge of 65s. a ton, made to persons who are willing to receive their goods at the station at Camden Town, is both unreasonable and unequal. In truth, by reason of the company's contract with Chaplin & Horne, the former are carriers from Lancashire to Camden Town only, and there their responsibility stops, the latter taking upon themselves all responsibility for any loss which may occur afterwards, for which *they* are compensated by the additional charge of 10s. per ton, sought to be imposed upon the plaintiffs.

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Cowling, contra.—First, as to the question relating to the carriage of small parcels. If the company have no power to impose a larger rate of payment in such a case as this, it is obvious that other carriers might undertake to carry all parcels under 112 lbs. at a cheap rate, e. g. 1s. a-piece, and might carry them by the railway; and thus, putting in one package, which shall not exceed 112 lbs., a great number of small parcels, the carrier would receive for the carriage of them 1s. each, whereas he would pay the company 2s. 6d. only for the carriage of the package, although they sustained all the trouble, expense, and risk. It is necessary, therefore, that the railway company should have the power of protecting themselves in such a case. If so, the question is whether, under all the circumstances, the scale of prices adopted is really unreasonable. The onus is on the plaintiffs to shew that it is so. In — *v. Jackson (a)*, Lord *Kenyon* says, "There are acts of Parliament which authorize justices of the peace to fix the rates to be taken by carriers, and I have known instances of applications to the sessions for that purpose; but when no rate is fixed by law, the carrier is entitled to say on what terms he will carry. He is not obliged to take every thing which is brought to his warehouse, unless the terms on which he

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chooses to undertake the risk are complied with by the person who employs him." In *Wyld v. Pickford* (a), Parke, B., says:—"We agree, if the notice furnishes a defence, it must be either on the ground of fraud, or of a limitation of liability by contract, which limitation it is competent to a carrier to make, because, being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry on the terms imposed by the common law, and insist upon his own." The defendants, therefore, as common carriers, may insist on their own rates of prices, unless it be shewn by the other party that they are unreasonable. And it is not enough to shew that one price may in itself be large, if the prices, generally speaking, for the carriage of goods be reasonable. Here it is found by the case that the prices charged by the company are lower than were charged before; that being so, the Court will hardly inquire whether under some particular circumstances one price might be reduced or not. But it is submitted that this particular charge is reasonable. The reasonableness of the remuneration depends not merely on the labour the carrier undergoes, but also on the risk he incurs. Now, how can that risk be computed, unless he is aware what are the goods he carries? What then is he to do? He cannot compel the party to unpack and display the contents of the package. Is he to be content with the assurance of the owner what are the goods? Surely not. The only course, then, left to him is to make such an increased charge as shall cover the additional risk. The ordinary course of dealing between carriers and their customers is, that each customer sends his own goods, and the liability imposed by law on carriers is established with reference to that state of things. It is in effect sought on the other side to make the railway company the servants of other carriers. The question as

(a) 8 M. & W. 458.

to the liability of carriers was much considered in *Riley v. Horne* (a); and there, in delivering the judgment of the court, *Best*, C. J., says, (p. 224), "We have established these points,—that a carrier is an insurer of the goods which he carries; that he is obliged for a reasonable reward to carry goods that are offered him, if his carriage will hold them, *and he is informed of their quality and value*; that he is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are; that if he does not ask for information, or if, when he asks and is not answered, he takes the goods, he is answerable for their amount, whatever that may be." [*Parke*, B.—Here the defendants *are* told what the goods are; the question is asked, and there is an answer, which does not appear to have been an untrue one.] In another part of the same judgment, (p. 222), it is said, "A carrier has a right to know the value and quality of what he is obliged to carry. If the owner of the goods will not tell him what his goods are and what they are worth, the carrier may refuse to take charge of them; but if he does take charge of them, he waives his right to know their contents and value." Here, when the defendants are informed that the goods belong to different persons, but do not know what they really are, they have a right to charge as much as they think reasonable, in order to cover the risk. [*Parke*, B.—They do not refuse to carry on the ground that they do not know what the contents of the parcels are. *Alderson*, B.—The ground of refusal is the reverse—because they *do* know what the contents are.] They refuse because they do not know who the several consignees are. [*Alderson*, B.—If the contents of the packages were spread out before them, they would have no greater information on that point.] At all events, they have a right on that ground to make an increased charge. More responsibility is incurred in such a case than when

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the goods belong to one person only. Where they belong to different persons, the carrier is subject to several actions in case of loss; not perhaps several actions of contract, but at all events several actions of trover in case of misdelivery or other conversion: *Owen v. Barnett* (a). The sum which the carrier ought to charge depends much more on the responsibility he incurs than on the mere labour, which of course must be the same with packages of equal weight. It has been decided that a carrier may charge for *booking*, and that the tender of the charge for conveyance, without an extra charge for booking also, would not be a sufficient tender of a *reasonable charge*: — *v. Jackson* (b). If then the carrier may refuse to carry, except on his own terms, if he has not full information as to the goods, here his terms are, “if you will not let me know how many and who are the consignees, I shall charge you 1d. per lb.” The option is given to the plaintiffs. But further, the 159th section is not to be confined to the case of *tonnage* rates, but includes all cases within s. 156, and enables the company to make such rates as they shall think proper in respect of all parcels not exceeding 500 lbs. That clause cannot be evaded by collecting in one package a number of small parcels altogether exceeding that weight; if so, its provisions will be altogether nugatory.

Secondly, the company have a right to say that their charge for conveyance to London is so much, and that for that they will also deliver the goods. In fact, the charge for delivery is not a separate charge, but is a portion of the charge for conveyance. [*Parke, B.*—It must be an unreasonable thing to charge the same thing for carrying and delivering, as for carrying only. *Alderson, B.*—Nor can it possibly be *equal* to charge the plaintiffs 65s. for that for which you charge Chaplin & Horne 55s.] If the act gives the company the power to carry along the railway, it

(a) 2 C. & M. 353.

(b) 2 Peake's N. P. C. 185.

impliedly imposes the duty to deliver also. [The Court, however, expressed so strong an opinion against the learned counsel on this point, that he abandoned it.]

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Martin, in reply.—It is obvious that the charge of 1*d.* per lb. on the whole weight will amount, whatever be the number of small parcels, (at least if they exceed 15 lbs. each), to far more than the charge for the parcels separately; so that this is, in effect, a *penalty* imposed on persons who put up small parcels together, compelling them to pay an extra price. With respect to the supposed increase of danger, or responsibility, arising from putting small parcels together, it is merely imaginary; but if it were otherwise, that is one of the chances which carriers undertake, and the same thing is continually done by the railway companies themselves. The only question really is, whether this is a reasonable charge within sect. 156. No action for breach of duty as carriers could be brought against the defendants by any body but the plaintiffs, with whom alone their contract is made; because the action, though in tort, is founded upon the contract. They might indeed be liable to the owners for a *positive misfeasance*; but that cannot entitle them to make a charge beyond that which as carriers they would be entitled to make.

Cur. adv. vult.

The judgment of the Court was now pronounced by

PARKE, B.—The two main questions raised in this case are, first, Whether the defendants were bound to carry a hamper containing several parcels, each less than 112 lbs., directed to and intended for different persons, for the sum offered to them by the plaintiffs: and 2ndly, Whether they were bound to carry a parcel from Manchester to Camden Town for the sum offered to them by

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the plaintiffs. There were two hampers, each containing several such small parcels, tendered at different times to the defendants, but the same question arises as to both. The sum tendered in respect of each is found to have been the full amount the defendants were entitled to receive for the receipt and carriage of the hamper and its contents, and for all other charges, unless they were entitled to charge for each parcel contained in the hamper separately, or to charge one penny per pound on the gross weight of the hamper and its contents. We are to determine, therefore, whether the defendants are entitled to make either charge—a mixed question of law and fact; the fact being submitted to us by consent of the parties as to a jury.

Under the act of Parliament establishing the Grand Junction Railway Company, the 3 Geo. 4, c. xxxiv, the company is authorized, by sect. 156, to carry upon that railway all such goods, &c. as should be offered, and to make such *reasonable* charges for such carriage and conveyance as they may from time to time determine upon, in addition to tonnage and tolls, without any other restriction, in the case of goods, than that the *charges should be reasonable*. By 4 Will. 4, c. lv, s. 19, these powers are extended to the carriage of all goods that should be offered on other railways, but they are still to make *reasonable charges for such carriage*.

By virtue of these clauses, the company, in their character of common carriers, are bound to carry for *reasonable* charges, if reasonable charges are tendered to them. The first question then is resolved into this, whether for the two hampers, containing small parcels consigned to different persons, it is reasonable to charge either for each parcel contained in the hamper separately, or one penny per pound on the gross weight of each hamper and its contents.

The charge is no doubt to be varied according to the trouble, expense, and responsibility attending the receipt,

carriage, and delivery of different articles; and for small parcels more ought to be paid than a proportionate part, according to weight, of the price of larger parcels of the same commodity, by reason of the greater trouble in receiving, despatching, and delivering them, and their exposure to a much greater risk of abstraction or loss. But, if all the small parcels are united in one large package, and delivered to the carrier in that package, consigned to one person, the trouble and responsibility are apparently reduced precisely to the same degree as if all the articles contained in the package were the property of the same owner, and intended to be delivered to him. There would seem, therefore, to be no right to charge for such package of distinct parcels, belonging to different owners, more than if they belonged to the same. But then it is argued, on the part of the defendants, that there really is an increased responsibility, arising from the simple fact that each parcel is the property of a distinct owner, because it is said that, in the event of a misdelivery, the company would be liable to several actions of trover instead of one, and even in case of loss or damage by neglect, each separate owner might maintain an action on the custom of England, in respect of his own goods. It is very doubtful, at least, whether, on the custom of England, separate actions could be maintained, as the relation of employer and carrier would not have subsisted between them and the company, but between them and the plaintiffs. As actions of trover, however, could be maintained, it would not be unreasonable to allow some additional remuneration, on account, not of the liability to pay greater damages, for they would be the same in both cases, but to pay the same damages by means of different suits. We are relieved, however, from the necessity of deciding what the precise amount of additional compensation (which at all events should be trifling) on this account should be, because it is admitted on the special case, that the sum

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tendered is proper, unless the defendants had a right to charge for separate parcels; which they certainly had not, because neither the trouble, expense, nor responsibility was *the same* as if the parcels had been separate; or unless the defendants had a right to charge one penny a pound on the whole. We have no difficulty in saying that this last-mentioned remuneration is excessive, and unjustified by the increase of responsibility from the circumstance of the properties being separate. It is impossible to support, on this ground, a charge for 4*l.* 1*s.* 8*d.* for the first package, for which, if it had consisted of parcels, one property, 1*l.* 6*s.* 6*d.* would have been the proper charge, and a charge of 3*l.* 1*s.* 6*d.* instead of 9*s.* for the second.

We are of opinion, therefore, that the plaintiffs are entitled to our judgment on the first question raised between the parties, which is the subject of the two first counts.

As to the second question, the Court have already intimated their opinion, that the company cannot support a claim for the same sum for carriage to Camden Town, and for carriage thither and delivery at any place in London. By the provisions already referred to, they are to carry for reasonable charges for carriage, and by 3 Vict. c. xlix, s. 26, such charges are to be made equally; and it is clearly unreasonable and unequal to charge the same sum to a consignee who is willing to receive the goods at Camden Town, and one who requires them to be delivered at the London Docks or elsewhere in London. The plaintiffs are bound to pay the balance of the 65*s.* per ton, after deducting the reasonable charge for delivering in London, and no more, and the defendants must carry to and deliver at Camden Town for that sum.

The plaintiffs are therefore entitled to succeed upon the second question raised by this special case.

The verdict on all the issues is to be entered for the plaintiffs.

Judgment for the plaintiffs.

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CASE. The declaration stated, that before and at the time of the committing of the grievances by the defendants as thereafter mentioned, certain messuages, starch-houses, workshops, and buildings, with the appurtenances, did adjoin to certain land in the possession of the defendants, and were in the possession and occupation of certain persons, to wit, James Woodhead and John Woodhead, as tenants thereof to the plaintiffs, the reversion thereof then and still belonging to the plaintiffs, and which said messuages, &c., had been and then were built and fitted up with divers fixtures, implements, and effects of the plaintiffs therein, and had long been and then were used for the purpose of manufacturing starch therein and therewith, and for divers other purposes, and in which said messuages, &c., during all the time aforesaid there of right had been and were, and still of right ought to be, divers, to wit, 100 ancient windows, through which the light and air, during all the time aforesaid, ought to have entered, and still of right ought to enter into the said messuages, &c., for the convenient and wholesome use, occupation, and enjoyment thereof: yet, the defendants, well knowing the premises, but contriving, &c., to injure, prejudice, and aggrieve the plaintiffs in their reversionary estate and interest of and in the said messuages, &c., while the said messuages, &c., were so in the possession and occupation of the said James Woodhead and John Woodhead as tenants thereof to the plaintiffs, and while the plaintiffs were so interested therein as aforesaid, to wit, on &c., and on divers

By a railway act, it was provided, that nothing in the act contained should authorize the Company to take, injure, or damage, for the purposes of the act, any house or building which was erected on or before the 30th November, 1835, without the consent in writing of the owner or other person interested therein, other than such as were specified in the schedule to the act, unless the omission therefrom proceeded from mistake, &c.

A subsequent clause contained provisions for settling all differences which might arise between the Company and the owners or occupiers of any lands which should be taken, used, damaged, or injuriously affected by the execution of any of the powers granted by the act, and

for the payment of satisfaction or compensation, as well for damages already sustained, as for future temporary, or perpetual, or any recurring damages:—*Held*, that the Company were liable, in an action on the case, to the reversioner of a house erected before the 30th November, 1835, and not specified in the schedule, for damage done to it by the obstruction of its lights by a railway station erected by the Company under the act, and by the dust, &c., drifted from the station and embankment into the house; and that the plaintiff was not bound to come in under the compensation clause.

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other days and times, &c., wrongfully and unjustly, without the leave or license and against the will of the plaintiffs, erected and built a certain railway station, wall, and embankment, in and upon the said land in possession of the defendants as aforesaid, and near to the said messuages, &c., and wrongfully and injuriously kept and continued the said railway station, wall, and embankment for a long time, to wit, &c., by means of which said several premises the light and air, during all the time aforesaid, were and still are hindered and prevented from coming and entering into and through the said windows, or any of them, into the said messuages, &c., and the same have thereby been rendered and are dark, close, uncomfortable, and unwholesome, and less fit and commodious for the purpose of manufacturing starch therein, and for the other purposes for which the same had been heretofore used; and also, by means of the premises, divers large quantities of earth, soil, dust, and dirt were, during all the time aforesaid, and continue to be carried, drifted, blown, scattered, and spread from and off the said railway station, wall, and embankment, so erected by the defendants as aforesaid, against, into, and through the said windows, and into the said messuages, &c., and into and amongst the fixtures, implements, and effects therein; and thereby the said messuages, &c., fixtures, implements, and effects became and were rendered dirty, foul, and clogged up, so that the same became and were less fit and commodious for the said purpose of manufacturing starch therein and therewith, and for the other purposes to which the same had been heretofore used; by means of which said several premises, the said messuages, &c., became and were and are greatly deteriorated in value, and the plaintiffs have been and are greatly damnified, &c., in their reversionary estate, &c.

Pleas, first, not guilty; secondly, as to so much of the declaration as relates to the alleged hindrance and

prevention, by the means therein mentioned, of the light and air from coming and entering into and through the said windows, &c., and as to the supposed causes of action in respect thereof, that they the defendants, before and at the time of the committing of the said alleged grievances were, and still are the body corporate mentioned in a certain act of Parliament, made and passed in the 7 Will. 4, intituled "An Act for making a Railway from Sheffield to Rotherham," &c., and also in a certain other act of Parliament, made and passed in the 3 Vict., intituled "An Act to enable the Sheffield and Rotherham Railway Company to raise a further sum of Money, and to amend the Act relating to the said Railway." And the defendants further say, that the said land so in the possession of the defendants as in the declaration mentioned was, before and at the time of the committing of the said alleged grievances to which this plea is pleaded, and still is, land purchased by the defendants after the passing of the said first-mentioned act of Parliament, in pursuance of the powers and provisions therein contained, for the purpose of making and providing a certain station, warehouses, and other buildings and conveniences for receiving, depositing, loading, and keeping goods, matters, and things conveyed and intended to be conveyed upon the said railway in the said act mentioned, and for other purposes connected with the undertaking thereby authorized. And the defendants further say, that the said railway station, wall, and embankment in the declaration mentioned, were so erected, made, and built in and upon the said land as in the declaration mentioned, and so kept and continued by the defendants, as therein mentioned, in the bonâ fide execution of the powers by the said first-mentioned act granted, and for the purposes and according to the provisions and restrictions of the same act, the said railway station, wall, and embankment having been respectively adjudged requisite, and having been constructed and made by the

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defendants under the powers and provisions of the said act, for the purpose of providing a certain station and yard, buildings, and conveniences for the purposes of the said undertaking, to wit, at Rotherham aforesaid, at the termination of the said railway there, they the defendants then doing as little damage as might be in that behalf.—
Verification.

There was also a similar plea to the residue of the declaration.

Replication to the second and third pleas, that the said messuages, &c., in the declaration mentioned are houses and buildings which were erected before the 30th day of November, 1835, to wit, on &c., and that the said several grievances in the plea mentioned were committed by the defendants, and the said messuages, &c., were thereby so injured and damaged as in the declaration alleged, without the consent in writing of the plaintiffs, so being owners of the said several messuages, &c., as in the declaration mentioned, and without the consent in writing of any other person interested in the said messuages, &c.; and that the said messuages, &c., were not, nor are nor were, nor are any of them or any part thereof, specified in the schedule annexed to the said act of Parliament of the 7 Will. 4, and that the omission of the said messuages, &c., from the said schedule did not proceed from mistake.—Verification.

General demurrers, and joinders in demurrer.

The following point was marked for argument on the part of the defendants:—That the railway station, wall, and embankment in the declaration mentioned, having been (as is admitted upon the pleadings) erected in the bonâ fide execution of the powers of the defendants' act of Parliament, the defendants are protected by such act, and particularly by the 5th section thereof, from being sued at law in respect of such erection; and further, that the 20th section of the said act does not extend or apply to injury

or damage of the description and character of that alleged in the declaration.

The case was argued on a former day in these sittings (June 22) by

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W. H. Watson, in support of the demurrer.—The company are not liable in this action. The question depends upon the construction to be put on the 20th section of the act of Parliament, 6 & 7 Will. 4, c. cix, which provides, that nothing in the act contained shall authorize the company to take, *injure, or damage, for the purposes of this act*, any house or building which was erected on or before the 30th November, 1835, or any land then set apart and used as a garden, &c., without the consent in writing of the owner or other person interested therein, other than such as are specified in the schedule, unless the omission therefrom proceeded from mistake, &c. The words “injure or damage,” in this clause, have reference to injury or damage done in the course of taking or using land, &c., for the purpose of constructing the railway. The clause immediately follows those by which the compulsory powers of entering upon and taking land are vested in the company, and operates as a proviso on and limitation of those powers. The plaintiffs should have claimed compensation under the 35th section, which contains provisions for the settling all differences which may arise between the company and the owners and occupiers of any lands which shall be taken, used, damaged, or *injuriously affected* by the execution of any of the powers thereby granted, and for the payment of satisfaction or compensation, as well for damages already sustained as for future temporary or perpetual, or any recurring damages. Different words being used in the two clauses, it must be supposed that they are employed in different senses; and the words “injuriously affected” are larger in their meaning than those of the 20th section,

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and comprise injury of every description, whether done in the taking of the land or not. The 5th section gives the general power to enter upon, survey, and take lands, and to do certain acts thereon, and on any lands adjoining thereto, necessary for making, &c., the railway and works, "making satisfaction in manner hereinafter mentioned to all persons interested in any lands which shall be taken, used, or *injured*, for all damages to be by them sustained in or by reason of the execution of any of the powers thereby granted." Sect. 20 uses the like words—"to take, injure, or damage, for the purposes of this act." In *Rex v. Pease* (a), where, under an act authorizing a company to make a railway between certain points, according to a plan deposited with the clerk of the peace, from which they were not to deviate more than 100 yards, and to use locomotive engines thereon, the railway was made parallel and adjacent to an ancient highway, and in some places came within five yards of it; on indictment against the company for a nuisance to the highway, by frightening the horses of persons passing along it, &c., it was held, that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, since the words authorizing the use of engines were unqualified, and therefore that the company were not liable to indictment. So here, the act of Parliament having given the company an unqualified authority to make these erections, it is not unreasonable to suppose that, by reason of the public benefit arising from the railway, the company are protected from actions or indictments, and that the only remedy of parties whose property is thus affected is under the compensation clause. The case of *Reg. v. Eastern Counties Railway Company, on the prosecution of Collingridge* (b), is a strong authority in favour of the defendants. By one of the clauses of their act (6 & 7

(a) 4 B. & Adol. 30; 1 Nev. & M. 690.

(b) 1 G. & D. 589.

Will. 4, c. cvi, s. 9), that company were empowered to raise or lower roads, making satisfaction in manner thereafter mentioned to all persons interested in any lands which should be *taken, used, or injured*, for all damages. Then another clause (sect. 29), "for settling all differences which might arise between the company and persons interested in any lands which should or might be *taken, used, damaged, or injuriously affected* by the execution of the act," contained provisions for the summoning of a jury to inquire into the amount to be paid by way of satisfaction for damages, to be assessed "separately from the value of the land so to be taken or used as aforesaid:" and it was held, that although the directions of this section applied in terms to compensation for such land only as should be *taken*, and to the ulterior damage consequent on such taking, yet the clause extended also to a case where the land of a party had not been taken, but had been injuriously affected by the lowering of a road in front of it, whereby the access to it was impeded. In that case damage similar in its nature to the present, and done to land not inserted in the schedule, was held to be within the terms of a similar compensation clause. And it is beneficial to both parties that it should be so. If an action be maintainable, this erection must be abated altogether, although declared by the act to be a public benefit. All parties have notice, by the depositing of the plan, and the advertisements in the Gazette, of the intended line of the railway, and whether their houses are likely to be affected by the use of it; and the compensation clause gives them a permanent and complete remedy. The legislature has declared this railway to be, when finished, a *public highway*: can it then be liable to be pulled to pieces for having injuriously affected some land lying in the neighbourhood, where, perhaps, such injury could not by possibility be foreseen,—as, for example, in the case of a well corrupted or dried up by the construction of the line? It is a most

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important question to railway companies, since, if the action be maintainable, there is no limit to such actions until the railway be discontinued; nay, the party may himself enter and abate the alleged nuisance, by pulling down the station and embankment, and altogether destroying the railway. With respect to the injury by the drifting of the dust, that cannot, at all events, be actionable, unless it be caused by *negligence* in the construction of the works; not for the mere drifting or blowing of sand in dry weather, which is necessarily incident to the use of the railway: *Turbervil v. Stamp* (a), *Vaughan v. Menlove* (b).

Crompton, contra.—The question arising on both the pleas is precisely the same; the complaint, as to both these matters, is of a construction of the defendants' works, whereby injury is done to the freehold of the house, so as to affect the reversioner. It is altogether a question as to the proper construction of the 20th section, and it clearly cannot be a case within the compensation clause, unless by section 20 the company were authorized to do this act. It is an established rule, that private acts of Parliament of this kind are in the nature of *contracts* with the public, and are to be construed most strongly as against the contracting party whose words they are. And it is submitted that the true construction is, that with respect to the favoured cases excepted in section 20, the parties injured are left to their common-law remedy by action. Such is the grammatical construction of the words, and why are they to be restrained as against the parties using them? How can it be said that it is not an *injury* to the plaintiffs' house? It is averred in the declaration, and that is confessed by the demurrer, to be a *permanent* injury, i. e. to the reversion. With respect to the argument *ab inconvenienti*, that applies equally against the company. Suppose in

(a) 1 Salk. 13.

(b) 3 Bing. N. C. 468; 4 Scott, 244.

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the course of their operations a well were tapped at a distance of two miles, which was not discovered until after the lapse of the six months; in that case the remedy is lost altogether, if it be only within the compensation clause. This, however, is purely a question of *construction*, and is not to be tried by a balance of inconveniences. It is a special exception in favour of this particular class of houses, for the very object of leaving the owners to the exercise of their common-law rights. The 20th section is not merely a restriction on the deviation clauses, but is a prohibition of *any* taking, injuring, or damaging the houses, &c., therein specified, for any of the purposes of the act; and if such injury is *prohibited*, it is clear that the compensation clauses do not apply, as they can only be applicable to the cases where the act contemplates that such injury is *to be committed*. The case is brought by the replication within the precise terms of the 20th section. Is it an injury to the premises? That is distinctly admitted, as the gist of the action is such an injury to the premises as to affect the reversion. Is it an injury to premises excepted? All buildings erected before the 30th November, 1835, are excepted, and these were built before that date. And how can the Court decide against the replication, without repealing that exception?

Watson, in reply.—Compensation clauses, in acts of this nature, have always been largely construed: as, for example, in the cases relating to the Hungerford Market (a). Here the legislature must have contemplated that this railway would pass through a town, and would necessarily do some injury of this nature, which ought to be compensated.

Cur. adv. vult.

(a) *Ex parte Farlow*, 2 B. & Market Company, 4 B. & Adol. 341; *Rex v. Hungerford* 592; 1 Nev. & M. 404.

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The judgment of the Court was now delivered by

PARKE, B.—The question raised by the pleadings in this case is, whether the defendants were authorized by their act, in constructing their railway station, to erect a station and embankment so near to the house of the plaintiff as to obstruct its lights, and cause damage to it by the dust and dirt drifted from it, such house having been erected before the 30th November, 1835, the house not having been specified in the schedule, nor omitted therefrom by mistake, and no consent in writing to the construction of the station or embankment having been obtained from the plaintiff, or any other person interested in the house. We think the defendants were not authorized, and that the plaintiff is entitled to our judgment.

The question turns on the 20th section of the 6 & 7 Will. 4, c. cix. [His Lordship read it.] Adopting the ordinary grammatical construction of the clause, the company could neither take the house in question, nor do any act by which it should be injured or damaged; and such construction certainly ought to prevail, unless it lead to an absurdity, or be manifestly repugnant to the intention of the legislature, as collected from the context, in which case the language may be modified so as to obviate such absurdity, or cure such repugnance. The argument, which brought before us all the material clauses of the act, and pointed out some inconveniences arising from constructing the proviso according to the ordinary sense of its words, has failed to convince us that this construction is repugnant to the rest of the act, or that any absurdity would follow if it were adopted.

There is no doubt some inconvenience to the company, in their being exposed to actions for unforeseen consequential damages arising from their acts to houses, buildings, gardens, &c., not comprised within the schedule, as by stopping springs communicating with them, or the

like : and we are not prepared to say that such inconvenience may not afford a ground, in those cases where the damage could not be foreseen, for limiting the general expression, and exempting the company from liability to an action, leaving to the party injured his right to compensation for the damage sustained. On that point, however, we pronounce no judgment. But in such a case as this, in which the damage could have been foreseen when the station and embankment were made, we see no reason to qualify the words of the clause, and consequently the company are liable to an action for damaging the house in question, by reason of the obstructing of its lights, and the nuisance to it by dust and dirt from the erecting of the station and embankment so near to it. As this house was erected before 30th November, 1835, the company ought to have considered, before the act was passed, whether the construction of any of these works would be injurious to it, and caused it to be inserted in the schedule ; and if that had been done, the owner of the house would have been put on his guard, and might have opposed the passing of the act. It was the fault of the company to omit it, and they must suffer for the omission ; and as they cannot now be permitted to purchase the house directly without the owner's consent, so they cannot be allowed to buy it indirectly, by causing its lights to be obstructed, and then leaving the owner to receive compensation under the act.

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H. & Co., of Hull, having sold to W., of Mickley Mills, near Leeds, twenty mats of flax, they were, on the 10th of August, sent by railway to Leeds, and arrived at the defendants' warehouse at Leeds, where it was the custom for the defendants to receive goods sent for W., and to give him notice of their arrival, and for him to send his carts for them. On the 16th of August, W. sent his cart and took away ten of the mats. On the 18th of August, H. & Co. sold to W. twenty other mats of flax, and a quantity of other goods.

TROVER by the sheriff of Yorkshire for twenty mats of flax. Pleas, not guilty and not possessed; on which issues were joined.

At the trial before *Parke, B.*, at the last Spring Assizes at York, it appeared that on the 10th of August, 1841, Messrs. Hill & Co. of Hull, having sold to a Mr. Weatherall, of Mickley Mills, a place about thirty miles from Leeds, twenty mats of flax, they were forwarded by railway to Leeds, and duly arrived at the warehouse of the defendants (who are carriers) at that town; and on the 16th of August, Weatherall sent his cart there and took away ten of the mats. It appeared that the warehouse was a large shed at or near the railway terminus at Leeds, and that it was the custom for the defendants to give notice of the arrival of goods at their warehouse to Weatherall, who sent his wagons or carts for them, and carried them to Mickley Mills. On the 18th of August, there was another sale by Hill & Co. to Weatherall of 20 other mats of flax, and a quantity of other goods. The flax was sent by railway to Leeds, and duly arrived at the defendants' warehouse, and the

The flax was sent by railway to Leeds, and arrived duly at the defendants' warehouse; the other goods were sent by sloop to Boroughbridge. On the arrival of this flax at the defendants' warehouse, notice was given to W. by letter, which stated that unless the goods were sent for, they would remain there at warehouse rents. On the 23rd of August, W. sent his cart and took away ten of the latter mats, and left there ten of the mats last sent, and ten of the former. On the 8th of September, W. having become insolvent, the goods which had been shipped for Boroughbridge were stopped in transitu at Hull; and on the same day the ten mats of flax of the second parcel were also stopped at Leeds by H. & Co. On the 11th September the sheriff entered, and seized all the flax in the defendants' warehouse sent by H. & Co., under an execution against W. On the 15th of September, there was also a stoppage by H. & Co. of the remaining ten mats of the first parcel. It was found by the jury at the trial, that the parties contemplated that the goods were to be used for the purpose of manufacture at Mickley Mills:—*Held*, under the above circumstances, that the transitus was at an end on the arrival of the goods at the defendants' warehouse.

Held, also, that the stoppage of the goods which had been shipped to go to Boroughbridge had not the effect of revesting the property in the parcel of flax which had been sent to the defendants' warehouse at Leeds, although comprised in one joint contract with the other goods.

Seemle, Lord Abinger, C. B., *dissentiente*, that the effect of a stoppage in transitu is not to rescind the contract, but only to replace the vendor in the same position as if he had not parted with the possession of the goods.

Held, that, at all events, the vendor had no right to retake that part which had arrived at its journey's end.

other goods were sent by sloop to Boroughbridge. On the arrival of the different parcels of flax at the defendants' warehouse, notice was given to Weatherall by letter, which stated, that unless the goods were sent for, they would remain there at warehouse rents. No rent was however charged to or paid by Weatherall. On the 23rd of August, Weatherall sent his waggon and took away ten of the latter mats, and left there ten of the mats last sent and ten of the former. Previously to the 8th of September Weatherall became bankrupt, and on that day, the goods which had been shipped for Boroughbridge were stopped in transitu on board the sloop at Hull. On the same day the ten mats of the second parcel were also stopped at Leeds. On the 11th of September, the sheriff entered and seized all the flax in the defendants' warehouse sent by Hill & Co., under an execution against Weatherall at the suit of Terry & Co., but the officers saw only the ten mats last sent. The defendants agreed to hold them for the sheriff, on an indemnity being given. On the 15th of September, there was a stoppage by Hill & Co. of the remaining ten mats of the first parcel.

The question at the trial was, whether Hill & Co. had a right to stop the goods, on the ground that the transitus was not at an end upon their arrival at the defendants' warehouse. The plaintiff's counsel contended that it was at an end, and that the defendants' warehouse was constructively the warehouse of Weatherall himself. The jury, in answer to a question put by the learned Judge, found that the parties contemplated that the flax was to be used for the purpose of manufacture at Mickley Mills. His Lordship directed the jury to find a verdict for the plaintiff, reserving the question of law for the opinion of this Court. The jury having accordingly found a verdict for the plaintiff, *Baines*, in Easter Term last, obtained a rule to shew cause why a nonsuit should not be entered; against which rule

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Dundas and Crompton, in Trinity Term (May 28), shewed cause. First, the transitus was at an end on the arrival of the goods at the defendants' warehouse at Leeds. That was constructively the warehouse of Weatherall himself; the goods were kept there for him, and if he did not send for them upon notice of their arrival, he was to pay warehouse rent. The cases on this subject are collected in the note to *Lickbarrow v. Mason*, in Smith's Leading Cases (a), and there the rule derived from all the cases is stated to be "that the goods are in transitu so long as they are in the hands of the carrier *as such*, whether he was or was not appointed by the consignee, and also so long as they remain in any place of deposit connected with their transmission. But that, if after their arrival at their place of destination, they be warehoused with the carrier, whose store the vendee uses as his own, or if they be warehoused with the vendor himself, and rent be paid to him for them, that puts an end to the right to stop in transitu." For this position the author cites numerous authorities, and amongst others *Allan v. Gripper* (b), and *Richardson v. Goss* (c). In the former case, *Bayley, B.*, in giving his judgment, cites *Foster v. Frampton* (d), and says, "it was there decided that when a vendee, for his own convenience, had desired the carrier to let the goods remain in the carrier's warehouse until he should receive further directions, the transitus was to be considered at an end, and the vendor was not entitled to stop in transitu on the insolvency of the vendee." And in *Richardson v. Goss*, where A. shipped goods to London to the order of B., but before their arrival, B. became in insolvent circumstances; the goods, however, arrived at the wharf of C., where goods shipped for B. were usually landed, and kept till sent for by him, the Court appears to

(a) Pages 431—435.

(d) 6 B. & Cr. 107; 2 D. & R.

(b) 2 C. & J. 218; 2 Tyrw. 217. 108.

(c) 3 Bos. & Pull. 127.

have been of opinion that the goods were no longer in transitu when they arrived at C.'s wharf, where they were usually landed and kept. In the present case, the goods having been transmitted by railroad to Leeds, arrived at the defendants' warehouse, where they were kept for the consignee, and it was for his convenience that the delivery to him was postponed. That brings the case clearly within the rule laid down by *Bayley, J.*, in *Foster v. Frampton (a)*. He there says, "Where a man orders goods to be delivered at a particular place, the transitus continues until they are delivered to the consignee at that place; but that must be understood of a delivery in the ordinary course of business; for if the consignee, before the goods reach their ultimate destination, postpones the delivery, or does any act which is equivalent to taking actual possession of them, the transitus is at an end." And *Holroyd, J.*, there puts this very case. He says, "The transit of the goods was at an end by the act of the consignee's treating the goods as his own property, taking part to his own premises, and directing the other part to remain in the warehouse of the carrier. From that moment the latter ceased to be a carrier, and became a mere bailee." The judgment of *Littledale, J.*, is to the same effect. The present is even a stronger case, for there the consignee only took samples, whereas here half of each parcel was taken. In *Rowe v. Pickford (b)*, a trader in London was in the habit of purchasing goods at Manchester, and exporting them to the continent soon after their arrival in London. The goods so consigned to him remained in the waggon-office of the defendants, who were carriers, until they were removed by his agent for the purpose of being shipped. A consignment of goods for the trader was delivered to the defendants on the 9th and 12th of August. On the 14th and 17th the goods

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(a) 6 B. & C. 108.

(b) 8 Taunt. 83; 1 Moore, 526.

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arrived at the waggon-office of the defendants; on the 16th or 17th the trader became bankrupt, and on the 19th notice of non-delivery to the bankrupt was given by the consignor to the defendants, who, according to order on the 21st, delivered the goods to a third house; and it was held, that the assignees of the bankrupt were entitled to recover the goods deposited with the defendants, and that the right of the consignor to stoppage in transitu ceased on the arrival of the goods at the waggon-office of the defendants in London. That case is identical with the present, except that this is stronger; for there the journey was not at an end, as the goods were to go abroad. Unless something remains to be done by the carrier, the transitus is at an end upon the arrival of the goods at his warehouse. Here nothing remained to be done by the carrier, for the goods were not to be forwarded, but to be sent for by the consignee. He might either have sold them there, or given them a new destination. In *James v. Griffin (a)*, *Parke, B.*, says, "The actual delivery to the vendee or his agent, which puts an end to the transitus or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods; *Scott v. Pettit (b)*, *Rowe v. Pickford*; or at a place where he means the goods to remain, until a fresh destination is communicated to them by orders from himself; *Dixon v. Baldwin (c)*; or it may be by the vendee's taking possession by himself or his agent, at some point short of the original intended place of destination." It may be said on the other side, that there was to be a further transit to Mickley Mills; but that was not so, as the consignee was to take them there in his own carts.

Secondly, the consignee had in fact taken away part of the goods sold under one entire contract, and there are

(a) 2 M. & W. 6. (b) 3 B. & P. 469. (c) 5 East, 175.

many authorities to shew that in such case the right to stop in transitu is gone. Thus, in *Hammond v. Anderson* (a), a number of bales of bacon, then lying at a wharf, having been sold for an entire sum, to be paid for by a bill at two months, an order was given to the wharfinger to deliver them to the vendee, who went to the wharf, weighed the whole, and took away several bales, and then became bankrupt, whereupon the vendor, within ten days from the time of the sale, ordered the wharfinger not to deliver the remainder. By the custom of the trade, the charges of warehousing were to be paid by the vendor for fourteen days after the sale. It was held that the vendee had taken possession of the whole, and that the vendor had no right to stop what remained in the hands of the wharfinger. [*Parke, B.*—In this case there was a clear intention to separate the part taken as the cart would not hold more. *Alderson, B.*—The consignee takes away part of the goods, after he knows that they are lying at his risk, and at a rent in the defendants' warehouse.] In *Slubey v. Heyward* (b), A. shipped goods by the order and on the account of B., to be paid for at a future day, and bills of lading were accordingly signed by the master of the ship; one of the bills was immediately transmitted to B., who, before the arrival of the ship at the place of destination, sold the goods and indorsed the bill of lading to C. After the arrival of the ship, and a *delivery of part of the goods* to the agent of C., B. became bankrupt, without having paid A. the price of the goods; and it was held that by this delivery the transitus was at an end as to the whole of the goods. *Betts v. Gibbons* (c) is to the same effect. At all events, the plaintiff is entitled to recover ten mats, as the sheriff seized the whole twenty mats before the consignors stopped the other ten.

Thirdly, it is said that as another part of the goods, which

(a) 1 N. R. 69.

(b) 2 H. Bl. 504.

(c) 2 Ad. & Ell. 57; 4 Nev. & M. 64.

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were sent by river navigation to Boroughbridge, were stopped in due time, and the whole was contained in one joint contract, it had the effect of rescinding the contract, and revesting the property in the whole in the consignor. But that cannot be so; the authorities are strong against the effect of the stoppage being to rescind the contract; and even if the stoppage had that effect in general, the point does not arise in the present case, as here the stoppage of part of the goods could at most only have the effect of rescinding the contract pro tanto, and revesting the property in the last-mentioned portion of the goods.

Baines, Martin, and Liddell, in support of the rule.—The rule is, that an unpaid vendor has always a right to stop the goods which he has forwarded to the vendee under a contract of sale, whilst they are on their transitus, in the event of the vendee becoming insolvent. Here the twenty mats which were stopped at Leeds on the 8th of September, were merely at the warehouse of the carriers on their way to the consignee at Mickley Mills, the place of their ultimate destination, and the vendor had therefore a right to stop them. Lord *Tenterden*, in his *Treatise on Shipping* (a), states the true principle applicable to these cases. He there says, "Goods are deemed to be in transitu, not only while they remain in the possession of the carrier, whether by water or land, and although such carrier may have been named and appointed by the consignee; but also where they are in any place of deposit connected with the transmission and delivery of them, and until they arrive at the actual or constructive possession of the consignee, at the place named by the buyer to the seller as their destination. But if the consignee, before the goods reach their ultimate destination, does any act which is equivalent to taking actual possession of them, the transitus is at an

(a) Page 464, 6th edit.

end." Here the place contemplated between these parties as the destination of the goods was Mickley Mills, and the vendee had done no act equivalent to taking possession of them. According, therefore, to the principle laid down by Lord *Tenterden*, nothing less than an actual arrival at the place of destination would take away the vendor's right to stop the goods. In *Stokes v. La Riviere*, which is quoted in the argument in *Bohtlingk v. Inglis (a)*, Lord *Mansfield* is stated to have said, "No point is more clear, than that if goods are sold and the price not paid, the seller may stop them in transitu, *I mean in every sort of passage to the hands of the buyers.*" Have these goods come into the actual possession of the consignee? Clearly not. But then it is said that they were constructively in his possession, as he was to send for them, and they were there lying at a rent until he did so. But there was nothing to shew that any actual rent had been agreed to be paid, or ever was paid. The letter which the defendants sent to the consignee, stating that unless the goods were taken away, they would remain at warehouse rent, did not constitute the dealing between the parties, since there was no assent to it on the part of the consignee; and the defendants made no demand for rent when the sheriff seized the goods, neither was it shewn that they had ever received any rent on former dealings between them and Weatherall. It was the practice, no doubt, for Weatherall to send his cart to fetch the goods from Leeds, but the vendors knew nothing of that. The original destination was Mickley Mills, and nothing took place subsequently to alter it. [*Parke, B.*—Would not Weatherall have been liable for warehouse rent?] No; it is submitted he would not, as it had not been the course of dealing between them. [*Parke, B.*—If from the notice Weatherall might be liable to warehouse rent, the defendants' not insisting on it may have

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(a) 3 East, 397.

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been a forbearance to enforce the right, rather than the absence of the right itself.] But that cannot affect the right to stop in transitu. In *Morley v. Hay* (a), it was held that the right of the vendor to stop in transitu is paramount to any lien against the purchaser. It was there urged in argument, that a wharfinger had a general lien : to which *Bayley, J.*, answers, "Not upon goods which are going forward to another place;" and *Parke, J.*, says, "Not against a party who has a right to stop in transitu." And *Bayley, J.*, afterwards adds, "A wharfinger can derive a title to a general lien only by contract, but here the plaintiffs claim paramount Gamble (the consignee), the party with whom such contract must have been made." The stoppage was in this case complete, according to the principle laid down by Lord *Abinger, C. B.*, in *Gibson v. Carruthers* (b). His Lordship there entered into a complete investigation of the law on this subject, and although he dissented from the rest of the Court upon another point, there was no difference of opinion in this respect. He goes through all the cases, and amongst others adverts to *Hanson v. Meyer* (c), and states that, as far as that decision goes, "it is a decision that the assignees of the bankrupt vendee can have no property, as against the vendor, in any part of the goods which have not been actually delivered, or of which the transitus has not terminated." And he adds, that although by the law of England the contract for sale, and delivery to a carrier, transfer the property from the vendor to the vendee, yet nevertheless the vendee, if insolvent, cannot maintain an action of trover against the vendor or his agent, if the vendor, before the arrival of the goods at their destination, take measures to prevent their delivery to the vendee. The true question in these cases is, had the goods arrived at the destination given by the vendee to the vendor? and here they clearly had not, for

(a) 3 Man. & Ry. 396. (b) 8 M. & W. 321. (c) 6 East, 614.

Mickley Mills was that place of destination. Although it had been the practice for Weatherall to send his cart for the goods, the vendors knew nothing of it. [*Parke, B.*—It did not appear that the defendants ever sent the goods to Mickley Mills. The finding of the jury was, that the parties contemplated that the flax was to be used at Mickley Mills, but it is not said that that was mentioned as the place of destination.] The true ground of the right of stoppage in transitu is that on which it is put by Lord *Abinger* in *Gibson v. Carruthers*, namely, that it is no part of the contract, but that the law gives the right. [*Lord Abinger, C. B.*—But is it not open to the party to shew the fact as to where the vendee intended the goods to be brought? *Parke, B.*—The ultimate place of destination is that place to which the carrier is to carry the goods, and where the vendee is to receive them.] In *Whitehead v. Anderson (a)*, *Parke, B.*, in delivering the judgment of the Court, lays down the law as clearly settled, “that the unpaid vendor has a right to retake the goods before they have arrived at the destination *originally contemplated* by the purchaser, unless in the meantime they have come to the actual or constructive possession of the vendee.” It is admitted, that if it had been communicated to the vendors that the vendee was to send for the goods to Leeds, that would be the terminus of the transit, and the place of destination; but it was not so. The case falls precisely within the principle laid down by the Court in *James v. Griffin*. There *Parke, B.*, says (*b*), “Suppose the vendee to order goods which he purchased to be left at an inn, which was also the receiving house of a carrier, for the purpose of being forwarded to his own residence, their intended place of destination; but from the non-disclosure by the vendor of that purpose, the innkeeper supposed that he was to keep the goods till the vendee came himself for them, or

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(a) 9 Mee. & W. 534.

(c) Page 635.

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ordered them to be sent elsewhere. There is no doubt, I apprehend, that notwithstanding such ignorance of the innkeeper of his real character, the transitus would not be at an end whilst the goods were in the innkeeper's possession." No case can be more applicable to the present than the case there supposed. And Lord Abinger, C. B., said (a), "that as long as the goods had not come into the actual possession of the bankrupt, or to the possession of some immediate agent, who was finally to receive them on his account, the transitus still continued, and therefore it was competent to the vendor to stop them in transitu." The cases of *Foster v. Frampton* and *Rowe v. Pickford*, which have been cited on the other side, are distinguishable. In those cases the consignee had no warehouse, and the goods were not small parcels, but large hogsheads, which necessarily required a warehouse to receive them in. And as was observed of the latter case by Bayley, J., in *Coates v. Railton* (b), "The vendor had sent the goods to the place where he was directed by the vendee to send them, and it was then at the option of the latter to send them to any place on the continent. There was no ulterior place of destination named to the vendor." And he adds, "The principle to be deduced from these cases is, that the transitus is not at an end until the goods have reached the place named by the buyer to the seller as the place of their destination." The jury here could not have found that the parties contemplated that the goods were to go to Mickley Mills to be manufactured, unless they thought that that was the place of their destination. [Parke, B.—Suppose the goods had been put into Weatherall's cart, and it was conveying them to Mickley Mills?] That would fall within a different principle; there the goods would have come into the actual possession of the vendee, which is one of the exceptions. So in the case of *Hammond v. Anderson*, the vendee

(a) Page 636.

(b) 6 B. & Cr. 426.

had taken possession of the whole, and the right of stoppage was therefore gone.

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Secondly, it is said there has been a part delivery of the goods, and that that amounted to a taking possession of the whole by the consignee, whereby the right of stoppage in transitu was gone. But this case is distinguishable from those which have been cited on the other side, and even if it be not, the rule has been of late very much restricted. In *Jones v. Jones* (a), where there had been a part delivery of the goods, the question is stated to be *quo animo* the act is done; whether with the intention of taking the possession and dominion of the whole of the goods or not. And *Parke, B.*, there says, "The taking of samples is an equivocal act: it might be that he took them in order to ascertain whether he could dispose of any part of the goods there, without intending thereby to take actual possession. Again, the actual delivery of the 140 sacks is not sufficient; it is no more than a delivery of 140 sacks to a purchaser of 140, and not done with a view to take possession of the whole." In *Dixon v. Yates* (b), where also there had been a part delivery, it was held that the vendee never had acquired the actual possession of the goods. There all the cases were fully cited in the argument, but *Littledale, J.*, says, "Then it is said there was a part delivery here, and that that in point of law operated as a constructive delivery of the whole. But that rule is confined to cases where the delivery of part is intended to be a delivery of the whole." There was here no such part delivery.

But thirdly, even if the transitus was at an end on the arrival of the goods at the defendants' warehouse, there was here a stoppage of that part of the goods which had been shipped to go to Boroughbridge, and as they were included in one joint contract with the flax last sent, the stop-

(a) 8 M. & W. 431, 442.

(b) 5 B. & Adol. 313; 2 Nev. & Man. 177.

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page of that part had the effect of rescinding the contract, and revesting the whole in the vendor. If the effect of a stoppage in transitu is to rescind the contract, (and it is submitted that it is), the vendors are entitled to the whole of the goods comprised in the contract. There is no authority against its having that effect, but the cases lean rather to the contrary, though the point has never yet been expressly decided. In *Edwards v. Brewer* (a), *Parke, B.*, says, "Whether the effect of the stoppage in transitu be to rescind the contract, or merely to revest the lien, does not seem to be quite settled;" and he refers to *Clay v. Harrison* (b). And in *James v. Griffin* (c) he also says, "Whether this act of retaking rescinds the contract, or merely restores the right of possession, can hardly as yet be considered as finally determined." [Lord *Abinger, C. B.*—Surely the stoppage in transitu can only affect such of the goods as are actually stopped.] It is submitted that a stoppage of any part of the goods operates as a stoppage of all that have not actually come to the hands of the vendee. In *Clay v. Harrison*, the Court seems rather to have been of opinion that by a stoppage in transitu the contract was rescinded. [*Parke, B.*—That certainly was not the decision of the Court.] In that case *Patteson* says in argument, "By the common law the property in goods passes by the sale; if payment is to be made immediately, the vendor has a right to hold them till payment is made; but if credit is given he cannot do so;" upon which *Bayley, J.*, says, "Does not the vendor by stopping in transitu abandon all rights that he had against the purchaser?" from which it may be inferred that the learned Judge thought it had the effect of rescinding the contract. *Patteson* in answer cites *Kymër v. Suwercropp* (d); but that was a case of lien, and not of stoppage in transitu. But there is no case which decides that a man can stop in transitu, and maintain an ac-

(a) 2 M. & W. 379

(b) 10 B. & C. 99.

(c) Id. 632.

(d) 1 Camp. 109.

tion for the price of the parcel which has been delivered. In *Litt v. Cowley (a)*, Gibbs, C. J., says, "The law of stoppage in transitu says, that the property which was before in the bankrupt may be revested in the seller by notice to the carrier. The plaintiffs give that notice to the carrier, and thereby revest the property. Before such notice to the carrier to stop the goods, the purchaser may bring trover for them; after such notice, the seller may bring trover." It appears clearly from those expressions, that his opinion was that not merely the possession was regained, but the property was revested. The judgment of Lord Abinger, C. B., in *Gibson v. Carruthers*, also plainly shews that his Lordship thought that a stoppage in transitu had the effect of rescinding the contract. If such be its effect, its operation here was to revest the property at all events in the ten mats last sent, which had not been delivered by the defendants.

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LORD ABINGER, C. B.—It seems to me that a great part of the very learned argument which we have heard turns upon a question of fact, whether Leeds was the place of destination to which the goods were to be sent. It may be the place of destination at which the goods are to be at the consignee's risk, and I think that in this case it was the place where they were to be at his risk until he sent for them; and if so, and they were not to be forwarded by the defendants, that was a place of agency to receive the goods, and consequently the transitus was at an end. As to the question whether the stoppage in transitu had the effect of rescinding the contract, and revesting the property in the ten mats which had not been delivered, we wish to take time to consider.

PARKE, B.—I entirely concur in the opinion which has been expressed by my Lord Chief Baron on the principal

(a) 7 Taunt. 170.

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package was seized by the sheriff, the plaintiff, on the 11th of September. But in the mean time some remaining parcels, comprised in the same contract, which were forwarded by water-carriage to Boroughbridge, were stopped in transitu on the 8th September, and it was contended for the defendants, that this had the effect of revesting in the consignor, at that time, *all* the parcels contained in that contract, and, amongst others, that seized by the sheriff on the 11th September. We are all of opinion that this objection to the plaintiff's right to recover, in respect of the last-mentioned parcel, cannot prevail.

What the effect of stoppage in transitu is, whether entirely to rescind the contract, or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet finally decided, and there are difficulties attending each construction. If the latter supposition be adopted (as most of us are strongly inclined to think it ought to be, on the weight of authority), the vendor is entitled to retain the part actually stopped in transitu till he is paid the price of the whole, but has no right to retake that which has arrived at its journey's end. His right of lien on the part stopped is revested, but no more. My Lord Chief Baron has expressed an opinion, to which he still adheres, that the contract is rescinded by a stoppage in transitu, but he does not think that this affects the right of the vendee to retain that portion of the goods which have been actually delivered to him, or, in other words, have reached the place of their destination, more especially when the goods and the price may be apportioned, as in the present case, and a new contract be implied from the actual delivery and retention of a part. In either view of the subject, the stoppage of that portion of the goods conveyed by water affords no defence.

The rule must therefore be discharged.

Rule discharged.

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TROTT v. SMITH, Executor of Richard Edwards,
Deceased.

June 17.

COVENANT. The declaration stated, that whereas theretofore, in the lifetime of the said Richard Edwards, to wit, on the 20th July, 1825, by an indenture then made between the plaintiff of the first part, the said R. Edwards of the second part, and one W. J. Wilton of the third part (which said indenture, sealed with the seal of the said R. E., being in the possession of the defendant, the plaintiff cannot produce to the court here), after reciting, amongst other things, that the plaintiff had contracted and agreed with the said R. Edwards for the absolute sale to him of certain premises, particularly mentioned and described in the said indenture, at and for the price or sum of £1500 sterling, out of which said sum of £1500 was to be deducted a certain principal sum of £1200, secured to the said W. J. Wilton as thereinbefore mentioned; the said R. Edwards did for himself, his heirs, executors, administrators, and assigns, *covenant, promise, and agree with and to the plaintiff*, that he the said R. Edwards, his executors, &c., or some or one of them, should and would well and truly *pay or cause to be paid unto the said W. J. Wilton the said principal sum of £1200, and all interest due, accruing, and growing due on the same*;—as by the said indenture, reference being thereunto had, will, amongst other things, more fully appear. Nevertheless the plaintiff in fact says, that although afterwards and after the making of the said indenture, and before the commencement of this suit, to wit, on the 20th day of November, 1841, a large

Declaration in covenant stated, that by an indenture of assignment of certain leasehold premises, between the plaintiff, the defendant's testator, and W., the testator, for himself, his executors, &c., covenanted with the plaintiff to pay to W. the sum of 1200*l.*, and interest. By the indenture as set out in the plea on oyer, it appeared that the plaintiff had mortgaged the premises to W., with a proviso that if the plaintiff, his executors, &c., *six months after demand* in writing, should pay the 1200*l.* to W., W. would reconvey: that the assignment by the plaintiff to the testator was subject to the above indenture of mortgage to W., and to the payment to him of the said sum of 1200*l.*

There was then a general covenant for payment by the testator to W. of the said sum of 1200*l.* The plea then alleged, that no demand in writing of payment of the sum of 1200*l.* was made upon the plaintiff:—

Held, on demurrer to the plea, that the declaration was bad, since, as no demand of payment had been made by W. on the plaintiff pursuant to the proviso, the money was not due, and the defendant was not liable on his covenant.

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sum of money, to wit, the sum of £1500, being the amount of the principal money and interest secured by the said indenture, became due and owing under and by virtue of the same indenture, and still remains wholly due and unpaid; yet the said R. Edwards in his lifetime did not nor would, nor did nor would the defendant, as such executor as aforesaid, since the death of the said R. Edwards, well and truly pay or cause to be paid the same or any part thereof, according to the tenor, true effect, and meaning of the said indenture; but on the contrary thereof, he the said R. Edwards in his lifetime wholly neglected and refused, and the said defendant as such executor as aforesaid since the death of the said R. Edwards wholly neglected and refused, and still doth neglect and refuse, to pay the same, or any part thereof, either to the said plaintiff or the said W. J. Wilton; and the said sum of £1500 still remains wholly due, owing, and unpaid, contrary to the tenor and effect, true intent and meaning of the said indenture, and of the said covenant of the said R. Edwards so by him in that behalf made as aforesaid, &c.

First plea, non est factum.

The second plea, after craving oyer of the indenture, set it out in hæc verba, from which it appeared that the indenture declared or recited an indenture dated the 29th March, 1824, and made between H. C. Sturt of the one part, and the plaintiff of the other part, by which the said H. C. Sturt demised the premises therein mentioned, to hold the same to the plaintiff, his executors, &c., from Michaelmas Day, 1822, for the term of sixty-four years, at the rent therein mentioned. And the indenture also recited, that by indenture of mortgage dated the 15th of May, 1824, and made between the plaintiff of the one part, and John Towgood and William Wingfield of the other part, it was witnessed, that in consideration of £600 by Towgood and Wingfield paid to the plaintiff, he the plaintiff did thereby covenant with the said Towgood and

Wingfield that he would pay unto them the said sum of £600, with the interest for the same. And it was by the indenture of the 15th of May, 1824, further witnessed, that he the plaintiff did grant, bargain, sell, and demise unto the said John Towgood and William Wingfield, their executors, &c., the premises comprised in the said recited indenture of lease, to hold the same unto the said John Towgood and William Wingfield, their executors, &c., for all the residue of the said term of sixty-four years, except the last four days thereof, upon certain trusts therein particularly expressed, for the better securing the repayment of the said sum of £600 and interest. And the indenture also recited, that by another indenture of mortgage, bearing date the 12th April, 1825, and made between the plaintiff of the first part, the said John Towgood and William Wingfield of the second part, and the said W. J. Wilton of the third part, after reciting that the said John Towgood and William Wingfield had required part of the said sum of £600, and that the plaintiff had requested the said W. J. Wilton to lend him the sum of £1200, as well for the purpose of enabling him to pay off the said sum of £600 as for other occasions, which the said W. J. Wilton had agreed to do upon having the repayment thereof with interest secured to him in manner thereinafter mentioned; it was witnessed, that in consideration of £600 by the said W. J. Wilton to the said J. Towgood and W. Wingfield paid, and also in consideration of the sum of £600 to the plaintiff paid by the said W. J. Wilton, they the said J. Towgood and W. Wingfield, at the request and by the direction of the plaintiff, did bargain, sell, assign, transfer, and set over, and the plaintiff did assign, ratify, and confirm unto the said W. J. Wilton, his executors, &c., the premises comprised in and demised by the said first thereinbefore recited indenture of lease, with their appurtenances, together with the same indenture of lease and the said indenture

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of mortgage, to hold the same unto the said W. J. Wilton, his executors, &c., thenceforth for all the residue of the said term of sixty-four years therein, upon certain trusts therein mentioned; (that is to say) in trust for the plaintiff, his executors, &c. to hold the said premises, and to receive the rents, issues and profits thereof, until default should be made in payment of the sum of £1200 or the interest thereof, or some part thereof, contrary to the covenant for that purpose thereafter contained, with power for the said W. J. Wilton to sell and dispose of the same premises and every or any part thereof, in case default should be made in payment of the said principal sum or the interest thereof, or any part thereof, contrary to the proviso or covenant for that purpose thereafter contained; with a proviso therein contained, *that if the plaintiff, his executors &c. or any of them, should, immediately after the expiration of six calendar months next after demand should be made of payment of the said sum of £1200, (such demand to be in writing, but not to be good and valid unless made after the 12th day of April, 1828), pay unto the said W. J. Wilton, his executors &c., the sum of £1200, with interest in the meantime for the same after the rate of £5 per cent. per annum half-yearly, on the days, at the place, and in manner in the said indenture expressed for payment thereof, then the said W. J. Wilton, his executors &c., should at the request, costs, and charges of the plaintiff, his executors &c., assign the said premises with the appurtenances unto the plaintiff, his executors &c., or as he or they should direct or appoint, freed from all incumbrances done or committed by him the said W. J. Wilton, his executors &c., in the meantime;—as in and by the said several hereinbefore in part recited indentures will more fully appear. And the indenture also recited, that the plaintiff had contracted and agreed with the said R. Edwards for the absolute sale to him of the said lease, and the premises therein described, at the price of £1500 sterling, out of which said sum of £1500 was to be deducted the said*

principal sum of £1200 secured by the said hereinbefore in part recited indenture of mortgage to the said W. J. Wilton, and all interest thereon up to the 7th day of that instant July: that the interest on the said sum of £1200 up to the said 7th day of July amounted to the sum of 14*l.* 2*s.* 9*d.*, making together with the principal sum the sum of 1214*l.* 2*s.* 9*d.*, and no other money was then due and owing by the said plaintiff unto the said W. J. Wilton on the said premises. After the above recitals, it was by the said indenture witnessed, that in pursuance of the said agreement, and in consideration of the sum of 1214*l.* 2*s.* 9*d.* so owing as aforesaid for principal money and interest upon or by virtue of the said thereinbefore in part recited indenture of mortgage to the said W. J. Wilton as aforesaid, and also for and in consideration of the further sum of 285*l.* 17*s.* 3*d.*, making together with the said sum of 1214*l.* 2*s.* 9*d.* so due and owing as aforesaid, the whole of the said purchase money or sum of £1500 to him the plaintiff in hand paid by the said R. Edwards, he the plaintiff did grant, bargain, sell, assign, transfer and set over unto the said R. Edwards, his executors, &c. the said premises in and by the said thereinbefore in part recited indenture of lease demised and comprised; to hold the same unto the said R. Edwards, his executors &c., for and during all the rest, residue and remainder then to come and unexpired of and in the said term of sixty-four years therein granted by the said thereinbefore in part recited indenture of lease, subject nevertheless to the payment of the rent and to the observance and performance of the covenants therein reserved and contained, and on the part of the tenant, lessee, or assignee of the said premises to be paid, observed and performed, and also subject to the said hereinbefore in part recited indenture of mortgage to the said W. J. Wilton of the 12th day of April, 1825, and to the payment of the said principal sum of £1200 thereby secured, and all interest to accrue

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The indenture then contained the usual covenants of title, which were set forth, and then followed the covenant on which the plaintiff declared, which was, that "he the said Richard Edwards, his executors &c., shall and will well and truly pay or cause to be paid unto the said W. J. Wilton, his executors &c., the said principal sum of 1200*l.*, and all interest due and to accrue due for the same." The plea then alleged, that after the breaches of covenant in the declaration mentioned, to wit, on the 24th day of October, 1825, the plaintiff became bankrupt (setting forth the proceedings in bankruptcy). It then alleged, that afterwards, to wit, on the 24th of June, 1826, the plaintiff duly obtained his certificate of conformity under the commission, and that it was duly allowed by the Lord Chancellor. And the defendant further says, that the said sum of 1200*l.* so covenanted to be paid by the plaintiff to the said W. J. Wilton became due and payable to the said W. J. Wilton, according to the true intent and meaning of the covenant in the said indenture of the 17th April, 1825, before the plaintiff became a bankrupt as aforesaid, to wit, on the 20th July, 1825.—Verification.

The third plea began by alleging, that the indenture in the declaration mentioned was at the time of the making thereof in the words and figures in the plea of the defendant by him secondly above pleaded and set forth. And the defendant further says, that the proviso and covenant contained in the said indenture of the 12th day of April, 1825, and referred to in the said indenture in the declaration mentioned as the proviso and covenant for the payment by the said (a) R. Edwards to the said W. J. Wilton of the said sum of 1200*l.* and interest, were at the said time of the making of the said indenture of the 12th

(a) *Sic.* It should be "by the plaintiff to Wilton."

April, 1825, in the words and figures following, that is to say, " Provided always, and it is hereby declared and agreed, that *if the said Thomas Trott*, his executors &c., or any of them, shall and do immediately after the expiration of *six calendar months next after demand* shall be made of the payment of the said sum of 1200*l.* (such demand to be in writing and delivered to the said Thomas Trott, his executors, &c., or left at his or their usual or last known usual place or places of abode, *but no such demand to be good and valid unless made after the 12th day of April, 1828*), well and truly pay or cause to be paid unto the said W. J. Wilton, his executors, &c., at or in the common dining hall of Lincoln's Inn, the sum of 1200*l.*, together with interest in the mean time for the same after the rate of 5*l.* per centum per annum, by two equal half-yearly payments in the year, viz. on the 12th day of October and the 12th day of April in each and every year, and the first payment of such interest to be begun and be made on the 12th day of October next ensuing the day of the date of these presents, without making any deduction or abatement, either out of the said principal money or the interest thereof, for or on any account whatsoever, then and in such case he the said W. J. Wilton, his executors, &c., shall and will, at the request, costs and charges of the said Thomas Trott, his executors &c., assign the said premises [describing them] unto him the said Thomas Trott, his executors &c., or as he or they shall direct or appoint, and also the said indenture of lease of the 29th day of March, 1824, and the said indenture of mortgage, free from all incumbrances in the mean time to be made, done, or committed by him the said W. J. Wilton, his executors, &c., or any of them, any thing hereinbefore contained to the contrary notwithstanding. And the said Thomas Trott, for himself, his executors, &c., doth hereby covenant, promise, and agree with and to the said W. J. Wilton, his exe-

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cutors &c., that he the said Thomas Trott, his heirs, executors, &c., shall and will well and truly pay or cause to be paid unto the said W. J. Wilton, his executors &c., the said principal sum of 1200*l.*, with interest for the same after the rate aforesaid, at the time and in the manner hereinbefore appointed for payment thereof, without making any deduction or abatement thereout for or on any account whatsoever." And the defendant further says, that no demand in writing of the payment of the said sum of 1200*l.*, or of any interest thereon, or of any part thereof, was delivered to the plaintiff, or left at his usual or last known usual place or places of abode, six calendar months before the commencement of this suit, or at any time before the commencement of this suit.—Verification.

To the second plea the plaintiff demurred, assigning for causes, that it had not confessed and avoided, or traversed and denied, that the said R. Edwards did for himself, his heirs &c., covenant &c. as in the declaration mentioned, and also that the defendant had by his second plea tendered an immaterial issue, viz. whether the plaintiff did or did not become bankrupt; and that although it professes to be an answer to the whole of the declaration, it does not in truth contain any answer to it.

The plaintiff also demurred to the third plea on the same general grounds of objection as those taken to the second plea; and also that the defendant had tendered an issue as to whether the indenture of the 12th of April, 1825, did or did not contain the proviso in the third plea mentioned.

The defendant's point marked for argument was, that the declaration was bad, for not shewing where or how the sum covenanted to be paid was payable, and for other causes.

Ogle, in support of the demurrer.—The declaration is good and the pleas are bad. The declaration alleges that

the defendant's testator, in the assignment made by the plaintiff to him, covenanted with the plaintiff to pay Wilton the sum of £1200, and all interest due and to accrue due thereon. That assignment was certainly made subject to the said mortgage between the plaintiff and Wilton, which contained a proviso that if the plaintiff paid the principal money and interest to Wilton six months after demand, Wilton should assign the premises. The question therefore is, whether Edwards or his executor were bound to pay Wilton immediately, or not until six months' demand of payment has been made. The plaintiff contends, that the assignment to Edwards, containing a general covenant, was not clogged with the covenant in the mortgage deed between the plaintiff and Wilton, and that the money was therefore payable by the defendant's testator on demand.—He then contended that the second plea was bad, and cited *Winch v. Keeley* (a), *Carpenter v. Marnell* (b), *Beckham v. Drake* (c), *Dangerfield v. Thomas* (d), *Gardiner v. Rowe* (e).

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Atherton, contra.—The second plea is an answer to the action. All the cases shew, that a plea of the plaintiff's bankruptcy is good, unless the *possibility* of a beneficial interest in the bankrupt is excluded, either on the face of the declaration and plea, or by a replication to that effect. This appears from the cases cited on the other side. The ordinary plea sets up the plaintiff's bankruptcy, and the replication shews him to be a mere trustee. Here there is no replication; and, for anything that appears on the declaration and plea, the plaintiff *may* have had a beneficial interest in this contract, which would pass to his assignees. By breach of Edwards's covenant, the plaintiff may have

(a) 1 T. R. 619.

(b) 3 B. & P. 40.

(c) 8 M. & W. 846.

(d) 9 Ad. & Ell. 292; 1 P. & D. 287.

(e) 2 Sim. & Stu. 346.

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been called on to pay, and may have paid the money—which would be a damage, and diminish the estate.

The third plea shews the declaration to be bad.—A contract can only be set out in one of two ways; either in the very words of it, or according to the legal effect. Here the plaintiff undertakes to set it out according to its legal effect; but the record shews that he has not set it out correctly, and that he has omitted material averments in support of the action. The plaintiff has declared that the defendant covenanted to pay the money generally, whereas the covenant (as it appears on oyer of the indenture) was qualified by the proviso, that if Trott should pay the money to Wilton after the expiration of six months after a written demand, he would assign the premises and the house to the plaintiff. That is a ground of general demurrer, which the defendant may now avail himself of; the whole of the indenture declared on being, by the statement of it on the oyer, made part of the declaration. The plaintiff, on such a covenant as the declaration discloses, would not have been bound to shew that any demand had been made in compliance with the proviso. And yet, that the parties to the covenant intended that such a demand should precede the payment of the money, is clear from the considerations following:—The money was due *to Wilton*: Edwards took the premises assigned to him, subject (in express terms) to the mortgage to Wilton, and to payment of the money payable to him; and Wilton was *entitled* to have the money advanced by him continued on the security given to him by the plaintiff until 1828; whereas, if the construction contended for on the other side is correct, repayment of the principal and interest might have been *forced* upon Wilton in the year 1825. It cannot be said that Edwards was bound to pay immediately, and yet that he could not on his part insist on Wilton's accepting payment. But, even taking the covenant

as declared on, it must mean that the money was to be payable in *a reasonable time*; and there is no averment of the lapse of such period before action.

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Ogle replied.

PARKE, B.—It is unnecessary to express any opinion on the demurrer to the second plea, because we are clearly of opinion that the declaration is bad; which entitles the defendant to the judgment of the Court. The deed on which the action is brought is, by being set out on oyer, made part of the declaration. The declaration then shews that the money was payable, not immediately, but after demand in writing by Wilton; and no demand is alleged by the plaintiff. The result is, that the plaintiff does not by his declaration shew that the money claimed was payable to Wilton by the plaintiff, or, consequently, by the defendant, at the time of action brought. There must therefore be judgment for the defendant.

ALDERSON, B., and ROLFE, B., concurred.

Judgment for the defendant.

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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

June 27 & 28.

LOCKWOOD v. The ATTORNEY-GENERAL.

Held, in error in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that the keeper of a beer shop, licensed under 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 84, is still liable to the penalties imposed by 53 Geo. 3, c. 58, s. 2, for having in his possession any of the prohibited articles therein specified, or any article or preparation to be used as a substitute for malt or hops.

And that in order to render such a person liable to those penalties for having in his possession any of the articles *enumerated* in the 56 Geo. 3, c. 58, s. 2, it is unnecessary to aver or prove, either that the party had them in his possession to be used as a substitute for malt or hops, or that he had them in his possession with any criminal intention. But that where the information is for having in his possession any article not designated by name in that section, it is necessary to shew that it was intended to be used as a substitute for malt and hops in the making of beer.

An information on the 56 Geo. 3, c. 58, s. 2, charged that the defendant, being a retailer of beer, received and took into *and had* in his custody and possession a large quantity of liquorice, &c. &c. :—*Held*, that it was not double.

(a) 9 M. & W. 378.

Liama, J., *Coleridge*, J., *Coltman*,

(b) Before Lord Denman, C. J.,

J., *Maule*, J., and *Cresswell*, J.

Tindal, C. J., *Patteson*, J., *Wil-*

penalty, for that would be contrary to the maxim of law, that *nemo debet bis puniri pro eadem causâ*. It is therefore a repeal by implication of the former statute, so far as it is applicable to this matter, on the ground that the former statute would be superfluous if it remained in force; on the principles laid down in the cases of *Rex v. Trustees of Northleach and Witney Road* (a), *Barrett v. The Stockton Railway Company* (b), and *Henderson v. Sherborn* (c). [Patteson, J.—The penalty imposed by the 56 Geo. 3, is for having the articles therein mentioned in possession; that imposed by the 1 Will. 4, c. 64, is for selling them.] Some of the offences mentioned in the former act are provided against also by the latter, although undoubtedly the offence laid in this information—the receiving of the prohibited article into possession—is not one of them. But if the same principle be not applicable to both, it will follow that the greater offence of mixing beer with the prohibited articles, and selling it so mixed, (which is mentioned in both the acts), is now subject only to a penalty varying from £10 to £20; whereas the less injurious or perhaps perfectly innocent act of receiving the articles into possession—an act which is made penal only in order to prevent the commission of the other, of which it is an evidence—may still be visited with a penalty of £200. The true construction therefore is, that the penalty of the former act is repealed, expressly as to the substantive offence, and impliedly as to the act, innocent in itself, which was punishable only as tending to the commission of the substantive offence. [Coleridge, J. The first act prohibits several offences, and subjects them all to the same penalty. Let it be conceded that the second act affixes a lower penalty to one of these offences as regards certain persons, but it says nothing about the other; can you say therefore that it repeals the first act as to the

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(a) 5 B. & Ad. 978. (b) 2 Man. & G. 134; 2 Scott, N. R. 337.

(c) 2 M. & W. 236.

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other, merely because that is *reasonable*? *Maule, J.*—The object of the second act is clearly the protection of the health of the consumers of beer; it does not prohibit the use of any specific articles, but of any pernicious ingredients: but the first act is for the protection of the revenue. The scope of the two acts, therefore, is totally different.] It does not appear that the 56 Geo. 3, was directed merely to the protection of the revenue. The recital is, “that great frauds have been and are committed upon the revenue, and also upon *the public*, under pretence of using such colouring, &c.” Neither can the 1 Will. 4, c. 64, be considered as directed merely to the preservation of the public health; or if it was, it is hardly possible to conceive that it should have been intended to keep alive the former act for the protection of the revenue, at a time when beer had ceased to pay any duty as such. And if the penalty already imposed was adequate to prevent the commission of the offence, it could not be any ground for attaching an additional penalty, that another reason existed for the prevention of it. If the penalties be held to be cumulative, it follows that the brewer or publican may commit any of the offences mentioned in the 56 Geo. 3, for the penalty of £200, but the mere retailer of beer licensed under the 1 Will. 4, is subject for the same offence to penalties amounting to £220. If the argument for the defendant on this point be well founded, the first count, which merely states generally that the defendant is a retailer of beer, is bad, because it does not therefore follow that he is as such subject to the penalty of £200 for having received liquorice into his possession. It ought to have negatived his being a retailer of beer under the 1 Will. 4, c. 64.

II. The next question is, whether the words “for or as a substitute for malt or hops” do not override the whole of the articles enumerated in the 56 Geo. 3, c. 58, s. 2. The mere receiving, for whatever purpose, of one of the enumerated articles—pepper, for instance—into the possession of a brewer or retailer of beer, can hardly have been

meant to be made subject to a penalty of £200. Suppose the same interpretation to be applied to the previous branch of the clause, which prohibits the brewer from having in his possession "any liquor, extract, calx, or other material or preparation for the purpose of darkening the colour of worts or beer"—it would follow that no brewer could have any liquor in his brewery. It may be said on the other hand, that if the opposite construction is to prevail, a brewer might mix vitriol with his beer, provided it were not done "for or as a substitute for malt or hops." He might indeed, so far as regards any prohibition contained in this statute, but it would not therefore be a lawful act. Many articles, as well deleterious as innocent—arsenic and sugar, for example—are not enumerated in the statute, and might therefore, as far as its prohibition is concerned, be mixed with beer, not being used as a substitute for malt or hops. If the possession is prohibited without reference to its purpose, it seems extraordinary that the clause did not specify other deleterious articles also. The construction contended for by the defendant is the natural and grammatical one; but even if the statute be ambiguous, he is entitled to have the benefit of the ambiguity. The proper interpretation is as if the words "for or as a substitute for malt or hops" had immediately followed the words "put into any worts or beer." [*Maule, J.*—The person who drew the act probably wrote it partly as a brewer and partly as a lawyer, and divided the articles, not into those of which the possession is prohibited and those the use of which is prohibited, but into those that affect the colour and those that affect the quality of the beer.]

III. The penalty is imposed upon the party who "shall receive or take into, *or* have in his or her custody or possession," &c. in the alternative. This count, however, is not framed in the alternative; but charges that the defendant "received and took into, *and* had in his custody and possession, &c.": and it is submitted that on this

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ground the count is double. A party may *have* a thing in his possession without *receiving* it;—for instance, he may have manufactured it. The case of *Attorney General v. King* (a) is an authority for the defendant on this point. There it was held that an information against a brewer, charging him with receiving and taking into his possession prohibited articles, was not supported by proof of a receiving antecedent to the statute, although his possession had continued since. In *Rowe v. Ames* (b), to a declaration against the sheriff for neglect in not selling goods seized by him under a fi. fa., and falsely returning that they remained in his hands for want of buyers, the defendant pleaded, “that he did not take in execution any goods of R. W. (the debtor), or remain in possession by virtue of the writ for the space of time in the declaration mentioned;” and this plea was held bad for duplicity. So, unless the receiving and having in possession are identical, this count is double. In *Newman v. Bendyshe* (c), a conviction charging the party with keeping his house open for the sale of beer, and selling beer, and suffering the same to be drunk and consumed in the house at an unlawful hour, and imposing a single penalty, was held bad on the ground that it included more than one distinct offence.

J. Wilde, for the Crown, was directed by the Court to confine himself to the second point raised on behalf of the defendant.—The words “for and as a substitute for malt or hops” clearly apply only to the words immediately preceding—“or any article or preparation whatsoever.” If it had been intended that they should refer to the enumerated articles, the words would have been “or any *other* article or preparation whatsoever for and as a substitute for malt or hops”; as in the previous branch of the clause, where the word “other” is introduced—“or *other* material or

(a) 5 Price, 195.

(b) 6 M. & W. 747.

(c) 10 Ad. & Ell. 11; 2 P. & D. 340.

preparation such as has been heretofore used or as shall hereafter be made use of for or in the darkening of the colour of worts or beer." With respect to the alleged absurdity of supposing that the legislature would make it penal for a brewer merely to have these articles in his possession, it has been argued for the defendant that that is the case with respect to articles for darkening the colour of beer. These statutes are always drawn in very general and comprehensive words, and much is trusted to the discretion of the Attorney General, who alone can sue for the penalties, in carrying them into execution only in cases where an offence was really intended. This was a re-enactment on the repeal of a former statute, the 51 Geo. 3, c. 87, s. 16, which was in the same words, except that it prohibited the same enumerated articles, and did not contain the words "or any article or preparation whatsoever for or as a substitute for malt or hops." It is plain that under *that* act it was the intention of the legislature to subject to a penalty the merely having the enumerated articles in possession. Then, it being found that other noxious articles were used besides those there enumerated, the general words were added in the 56 Geo. 3, prohibiting the whole class of articles so used. The effect of the interpretation contended for by the defendant would be to make all the enumeration of specific articles unnecessary and useless. And if, as is manifest, the legislature intended to prohibit the putting any of the enumerated articles into the beer, that intention would be defeated, if it were necessary to prove in every case that they were meant to be used as a substitute for malt or hops.

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Bramwell was heard in reply.

LORD DENMAN, C. J.—The words of the act are—"No retailer or retailers of beer shall receive or take into, or have in his, her, or their custody or possession, or use or

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mix with or put into any worts or beer, any liquor, extract, calx, or other material or preparation for the purpose of darkening the colour of worts or beer, other than brown malt, ground or unground, as commonly used in brewing, or shall receive or take into, or have in his, her, or their custody or possession, or use or mix with or put into any worts or beer, any molasses, honey, liquorice, vitriol, quassia, coculus Indiæ, grains of Paradise, Guinea pepper, or opium, or any extract or preparation of molasses, honey, or liquorice, &c. &c., or any article or preparation whatsoever for and as a substitute for malt or hops."

The words "molasses, honey, liquorice," &c. are precise and particular, and need no further description or limitation as to their use or object: but the words "article or preparation" are extremely general, and without some words to give them point and effect, and to limit and control their operation, would include the most innocent articles used for the most innocent purposes. Those descriptive and limiting words are wanted in the second case, but not in the first case. This further appears from the first part of the clause, where, the only enumerated articles being "liquor, extract, calx, or other material or preparation," the words are added "for the purpose of darkening the colour of worts or beer," which override the whole. And I think it may be further observed, that the enumeration being simply an enumeration contained in the 57 Geo. 3, and combined with more general words in the latter act, that circumstance strengthens the argument, and shews the intention of the legislature.

I must, however, for my own part say that I have felt a good deal of doubt in the course of the argument, and certainly there have been some observations made to which I can in no degree assent. I do not at all, for my part—speaking for myself only—agree that the words "as a substitute for malt or hops" render it necessary to prove how portions of particular articles are to be used. It is assumed

in all the former acts of parliament, that all beer is unlawful which is not compounded of malt and hops, and therefore whatever is made an ingredient in beer that is not malt or hops, is a *substitute*, and an improper substitute, for those articles. It is not necessary to advert to other arguments which have been advanced, which may be equally open to question.—We all agree that the judgment of the Court below must be affirmed.

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Judgment affirmed,

NEWTON v. SCOTT.

June 28.

A WRIT of error having been brought upon the judgment of the Court of Exchequer in this case (a), it was now argued (b) by

A landlord distrained the goods of A. on his tenant's premises, for rent: the tenant afterwards became bankrupt, and obtained his certificate:—*Held*, on error in the Exchequer Chamber, (affirming the judgment of the Court of Exchequer) that the certificate did not operate as a release of the rent, and that the landlord had a right, in replevin at the suit of A., to avow for a return of the goods.

Peacock for the plaintiff.—The question is, what is the effect of a bankrupt's certificate upon his landlord's right of distress upon the goods of a stranger, for rent from which the bankrupt is discharged by his certificate? And the first inquiry is, what is the effect of a distress at common law? It is clear it is only a seizure of the goods into the custody of the law, through the medium of the distrainer, for the purpose of compelling the party liable to the services to render those services; that the distrainer acquires no property or even possession in the things distrained, nor any right to use or dispose of them, but the property remains in the tenant, who may sue in trespass any person who takes them out of the custody of the distrainer. *Gilbert on Distresses*, 1; *R. v. Cotton* (c), *Mores v. Conham* (d),

(a) 9 M. & W. 434.

Coltman, J., Maule, J., and Cress-

(b) Before Lord Denman, *well, J.*

C. J., *Tindal, C. J., Patteson,* (c) *Parker*, 112.

J., Williams, J., Coleridge, J., (d) *Owen*, 123.

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R. v. Lee (a). Then the stat. 2 W. & M. st. 1, c. 5, was passed, which entitles the landlord to sell the goods distrained, if not replevied within five days. But here the goods were replevied, and therefore the defendant had no greater interest than at common law. The statute was not intended to vest any property in the landlord, if the tenant came in and replevied: *Six Carpenters' Case (b)*. If, therefore, the goods are held irreplevisable merely to oblige the tenant to come in and perform the services, then if the tenant be discharged from the services, the owner of the goods is surely entitled to have them again, and might sue for them in detinue. If that be so, the defendant is not entitled to avow for a *return* of the goods, and his cognizance amounts at most only to a justification of the taking. Vin. Abr., Replevin, (F.); Id. Avowry, (P. 4). The judgment *pro retorno habendo* restores the goods into the custody of the law, to be kept till the tenant performs the services. [*Patteson, J.*—Suppose all this to be conceded; the real question is whether the certificate is a release of the rent: it is not enough to shew that the tenant is personally discharged]. If the tenant be discharged from the performance of the service, the law cannot keep a stranger's goods to compel performance of it. Suppose the landlord had come in and proved under the fiat, could he have had a return of the goods? And after the certificate it makes no difference whether he has proved or not. By the 121st section of the Bankrupt Act, 6 Geo. 4, c. 16, every bankrupt is to be discharged, on obtaining his certificate of conformity, from all debts due by him when he became bankrupt, and from all claims and demands proveable under the commission, subject to such provisions as thereafter directed. [*Patteson, J.*—All which are as to suing him: but the certificate does not discharge the *debt*, but only the *remedy*]. It is in the nature of a release. *Lister v. Mun-*

(a) 6 Price, 369.

(b) 8 Rep. 147.

dell (a), *Hanson v. Blakey* (b), *Davis v. Shapley* (c). [*Patteson*, J. referred to the 74th section]. It was not the intention of that section to give any right of distress; it is a restraining clause; 1 Atk. 103. [*Patteson*, J.—It recognises the landlord's right to distrain notwithstanding the bankruptcy]. If the certificate be not held to be a bar to the claim for rent, the landlord may, after the tenant's bankruptcy and certificate, seize a stranger's goods for ten years' rent, though he can levy on the tenant's only for one year's rent; and thereby, although the tenant is discharged by the certificate, he will be made liable over for indemnity to the owner of the goods. [*Maule*, J.—The same inconvenience exists in the case of an uncertificated bankrupt]. The distinction is between the party who does and who does not conform to the bankrupt laws. But for the proviso in sect. 121, a co-debtor would be discharged. The bankrupt being discharged by act of law, the law will not suffer him by a circuitous process to be made liable as before. *Bradyll v. Ball* (d).

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Martin, contra.—The fallacy of the argument on the other side is in the assumption that the effect of the certificate is to release or extinguish the debt. It has no such effect, but is merely a personal discharge of the bankrupt, to the extent provided for in the bankrupt law. If the debt were discharged, so would a guarantor for the debt be. The case of a joint-debtor is not the exception, but the rule. Suppose a distress made for rent the day before the Statute of Limitations attached, a replevin, and an avowry after the expiration of six years; could there not be a return? This is in substance the same case; the remedy is gone, but not the debt. It is because the certificate is merely a personal discharge of the bankrupt, that, before the last act, a surety

(a) 1 Bos. & P. 427.

(c) 1 B. & Ad. 54.

(b) 4 Bing. 493; 1 M. & P. 261.

(d) 1 Bro. Ch. C. 427.

Exch. Chamber, for rent was not discharged thereby; *Inglis v. M'Dougal* (a); and it became necessary to introduce special provisions for the relief of sureties. It is true the distrainer has no *lien*, strictly so called: that which he obtained under the old law, on a replevin, was a contract that he should be put into the same condition as before the goods were taken from him; and that is all he asks here, under his replevin bond, which is in lieu of the old pledges. The stat. 17 Car. 2, c. 7, shews that at the moment when the distress is taken, and replevied, a right vests in the landlord to have judgment for the amount of his rent, so far as those goods will go to extinguish it. How could that right be affected by the long subsequent certificate?—He cited also *Tuck v. Fyson* (b), and *Briggs v. Sowry* (c).

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But further, upon these pleadings, what judgment could be entered up, according to the view taken for the plaintiff? The plea in bar seems to be in the nature of a plea puis darrein continuance: what is to become of the action itself? The plea in bar ought to support the declaration, but that is not done here. The stat. 7 Hen. 8, c. 4, s. 3, gives damages to the avowant in replevin, on his avowry being found for him; and here it is admitted that the goods were wrongfully taken out of the defendant's possession, therefore the statute applies. The plea ought to have set up the ex post facto matter by way of plea puis darrein continuance, because the plaintiff admits that the replevin was wrongful in the first instance. [*Cresswell*, J.—He is sustaining his action, not by anything done before action brought, but because since action brought the defendant has asked for a return].

Peacock, in reply.—It is said, if the certificate be a discharge of the rent, so would it be of a joint debtor or a surety, or of a lien. But it is only contended that it amounts to

(a) 1 Moore, 198.

(b) 6 Bing. 321; 3 M. & P. 715.

(c) 8 M. & W. 729.

a release to the tenant himself, not that it is a discharge of any collateral right, or person collaterally liable. In the cases cited on the other side, the question was as to the discharge of a surety for rent due *subsequently* to the bankruptcy. The form of avowry given by the stat. 11 Geo. 2, c. 19, s. 22, shews, that in order to entitle the defendant to avow and have a return, the rent must remain due to the time of the avowry; *Banks v. Angell* (a); then this plea in bar shews how it did not so remain due, by setting forth the bankruptcy and certificate. The judgment prayed is a judgment for the plaintiff on demurrer, the defendant having claimed that to which he had no right. If the certificate had been allowed *after* the avowry, then undoubtedly it would have been a plea *puis darrein continuance*, as pleading a fact which arose after the last continuance. As it is, the plaintiff is entitled to the same judgment as if it were a plea in bar to a declaration.

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LORD DENMAN, C. J.—It appears to the Court, that without entering more into the argument than was done in the Court below, a sufficient reason was there given for the judgment, by construing the language of the authorities to be that the certificate does not extinguish the debt, but only bars the remedy. That was the ground of decision in the Court below, and that is the argument which has been found to be insurmountable here.

Judgment affirmed.

MEMORANDUM.

In this Vacation, *Herbert George Jones*, of Lincoln's Inn, Esq., was called to the degree of the coif, and gave rings with the motto "*Bene Volens*."

(a) 7 Ad. & E. 843; 3 N. & P. 94.

REPORTS OF CASES
ARGUED AND DETERMINED
IN
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AND
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MICHAELMAS TERM, 6 VICT.

Nov. 3.

WILLIAMS, Executor, v. WILLIAMS.

Where, after the argument of a demurrer to a replication setting out continuing writs in answer to a plea of the statute of limitations, the plaintiff was allowed to amend by stating the indorsement on the writs as containing the date as well of the return as of the writs, in conformity with the Uniformity of Process Act; the Court, on a subsequent application, also allowed the writs themselves to be amended accordingly.

THE Court having, on the argument of the demurrer in this case (a), allowed the plaintiff to amend his replication, *Atherton* afterwards obtained a rule, calling upon the defendant to shew cause why the plaintiff should not be at liberty to amend the second and subsequent writs issued in this cause in the lifetime of the plaintiff's testator, H. R. Williams, by adding to the memorandum already indorsed on each of such writs, a statement of the day of the date of the return thereof, and why the entries on the roll should not be amended so as to correspond with such amended writs; and also by stating the appearances of the said H. R. Williams as appearances by one attorney only.

(a) *Ante*, p. 174.

Jervis now shewed cause.—The present application is made on the ground that the writs in their present state will not support the replication as amended by leave of the Court: but that is not a sufficient reason for the interposition of the Court. The original practice was, that the Court would not amend statutable writs in any case. To that rule two exceptions only have been introduced; first, in cases where the error arises from the misprision of the clerk; secondly, where otherwise the statute of limitations would be a bar to a fresh action. [*Parke*, B.—It was the constant course, before the passing of the Uniformity of Process Act, to make such amendments as this. Then can the effect of that statute be to compel a plaintiff to go on against a party who may be wholly unable to pay costs, or else be barred of his remedy?] Since the statute, the party ought not to have fresh writs, unless he have used due diligence to serve the defendant. The words of the 10th section are, that “every writ of summons and capias may be continued by alias and pluries, as the case may require, if any defendant therein named *may not* have been arrested or served therewith.”

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Atherton, contra.—The liberty which the Court gave to amend the pleadings implied that the plaintiff was to have the means of making a proper amendment; and that can only be done by making the writs conformable to the amended allegations of the replication. The only alteration introduced by the Uniformity of Process Act, was the necessity of having the writs returned and entered of record, and the continuing writs issued within a month after their expiration: in all other respects the old practice remains. Nothing is said in the statute about using diligence to serve the defendant; the words of the proviso are, “unless the defendant *shall have* been arrested thereon or served therewith, or unless such writs &c. shall be re-

Esch. of Pleas, turned non est inventus."—He cited *Lakin v. Watson* (a), 1842.

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Horton v. Inhabitants of Stamford (b), *Bilton v. Clapperton* (c), *Eccles v. Cole* (d), *Kirk v. Dolby* (e).

PER CURIAM,

Rule absolute, on payment of the costs of the amendment, and of this application.

(a) 2 C. & M. 625.

(d) 8 M. & W. 537.

(b) 1 C. & M. 773.

(e) 6 M. & W. 636.

(c) 9 M. & W. 473.

Nov. 4.

LLOYD, Administrator &c., v. MOSTYN.

An action on a bond of indemnity stood for trial at the Flintshire assizes: the commission day was on the 27th July; the cause was tried on the 29th. At 10 a. m. on the 28th, a notice to produce the bond was served on the defendant's attorney in the action (who resided in London) in the defendant's presence, in the assize town.

The bond was in the possession of one W., who held it as the representative of a former attorney of the obligors, and was himself the defendant's general attorney, and who had undertaken to produce it at the trial, if the judge should think he was bound to do so. Before the assizes, the bond had been sent by W. to the defendant's attorney in the action, in London, for the purposes of inspection and admission under a judge's order; and the plaintiff's attorney had there taken a correct copy of it. At the trial, W. had the bond in Court, but objected to produce it on the ground of privilege, and the objection was allowed.

Held, first, that the notice to produce the deed was sufficient, under the circumstances, to let in secondary evidence of it; secondly, that the copy so taken by the plaintiff's attorney was admissible as such evidence.

from him and the defendant (who was the eldest son of Samuel Mostyn, and then of age) the bond in question, which was conditioned to save harmless and indemnify the intestate from all actions, suits, claims, and demands whatever of the legatees or any of them, in respect of their shares of the legacy. In March 1841, a suit in equity was commenced by Thomas Mostyn, one of the legatees, against the plaintiff, as administrator of Edward Lloyd, to recover his third share of the legacy and interest. Various communications had previously passed between the plaintiff and the defendant on the subject of the claim made by Thomas Mostyn; and on the 19th of May, 1841, the plaintiff gave the defendant a formal notice in writing of the suit having been instituted against him, and requiring the defendant to indemnify him against it, pursuant to the condition of the bond. On the 7th of June, an order was made in the suit by the Vice-Chancellor of England, by consent of the parties, that the bill should be dismissed without costs; and the plaintiff thereupon paid to Thomas Mostyn the sum of £117, being his share of the legacy of £200, and interest thereon: and he now sought to recover from the defendant, under his bond of indemnity, the amount so paid, together with the further sum of £26 for the plaintiff's own costs in the equity suit.

It appeared at the trial, that the bond had not been known to be in existence until the year 1839, when it was found amongst a basket-full of old papers, in the house of a Mrs. Jones, the widow and executrix of the late attorney of the defendant and his father. It was now in the possession of a Mr. Williams, Mrs. Jones's son-in-law, who acted for her as executrix, and who was also the general attorney for the defendant, although not the attorney on the record in this action. Mr. Williams had not been served with a subpoena duces tecum to produce the bond, but had undertaken to do so if the Judge should think that he was bound to produce it, and he had it in Court at the trial. On being called upon to produce it, he objected

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to do so on the ground that he held it in the same character as Mr. Jones, if alive, would have done, namely, as the attorney of the obligors; and the learned Judge allowed the objection. The plaintiff then tendered in evidence a copy of the bond, which had been furnished to the plaintiff's agent, and examined by him with the original, upon the bond's being sent up by Mr. Williams to the defendant's attorney in London to be inspected, for the purposes of admission under a Judge's order. It was objected that this copy was inadmissible, on two grounds: first, that, the bond having been in the confidential custody of Mr. Williams, a copy so obtained could not be used in evidence; for which *Fisher v. Heming (a)* was cited as an authority; and secondly, on the ground that at all events it was not admissible without proof of notice to produce the original: and the learned judge, being of opinion that notice to produce was necessary, rejected the evidence. The plaintiff then proved a notice to produce the bond, which had been served upon the defendant's attorney in this action, the defendant being present, in Mold, the assize town, at ten o'clock in the morning of Thursday, the 28th of July. The commission day was Wednesday, the 27th; the cause was tried on Friday, the 29th. The defendant resided about ten miles from Mold; the attorney, Mr. Leigh, was resident in London. Mr. Williams, who held the bond, resided at Denbigh, fourteen miles from Mold, and arrived at the latter place, with the bond, in the afternoon of Thursday the 28th. It was objected for the defendant, that this notice was too late; the learned judge, however, thought that as the bond was actually in Court, the notice was sufficient, and that the copy was admissible, and it was accordingly read.

For the defendant it was contended, that the bond ought, under the circumstances, to be presumed to have been satisfied. The learned judge left that question to the jury, who found a verdict for the plaintiff for the whole amount

(a) 1 Phill. Evid. 182 (8th ed.).

claimed by him, 133*l.*, leave being given to the defendant to move to enter a nonsuit, if the Court should be of opinion that the copy of the bond ought not to have been received in evidence.

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Kelly now moved accordingly.—First, inasmuch as Mr. Williams, in whose possession the bond was, represented the attorney of the obligors, he was not bound to produce the bond; and if so, neither could a copy obtained from or furnished by him, contrary to his duty, be received in evidence. The rule is thus laid down in *Phillipps on Evidence*, vol. 1, p. 182: "If a deed deposited confidentially with an attorney has been obtained out of his hands, for the purpose of being produced in evidence by another witness, it cannot be received. Thus, in a case tried before Mr. Justice *Bayley* (a), the plaintiff's counsel having proved a certain deed in the possession of the defendant, and the defendant refusing to produce it, though he admitted having received notice, the counsel of the plaintiff offered in evidence a copy of the deed, which had been obtained from one who many years ago acted as an attorney for the person under whom the defendant claimed, and who had been intrusted by him with the original deed in his professional character. The counsel on the part of the defendant objected that this evidence ought not to be received, as the original deed had been deposited confidentially with the attorney; and *Bayley*, J., refused to admit it. He said, the attorney could not give parol evidence of the contents of the deed, which had been intrusted to him; so neither could he furnish a copy. He ought not to have communicated to others what was deposited with him in confidence, whether it was a written or verbal communication. It is the privilege of his client, and continues from first to last." That case appears to be expressly in point. [*Parke*, B.—I have always doubted the correctness of that ruling. Where an attorney intrusted confidentially with a document com-

(a) *Fisher v. Heming*, Leicester Lent Assizes, 1809.

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municates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it? Lord *Abinger*, C. B.—It is impossible to say this copy was not evidence].

Secondly, the notice to produce was not sufficient. In the first place, service on the day after the commission day was too late; *George v. Thompson* (a), *Doe v. Grey* (b). In the latter case, service of notice to produce a lease, upon the wife of the defendant's attorney at his lodgings, on the evening before the trial, was held insufficient. Besides, here the attorney had not the possession of the bond at the time, and he was resident in London. [Lord *Abinger*, C. B.—He had the power of obtaining the production of it at the trial]. The insufficiency of a notice to produce is to be determined upon the facts as they stood at the time of the service. [Lord *Abinger*, C. B.—I cannot assent to that. Suppose the party has not the document at the time he receives notice to produce it, but afterwards obtains possession of it, a week before the trial; is he not bound to produce it?] In this case the bond was held, not by the attorney in the cause, but by Williams, who was privileged from producing it: but even if the former had had it in his pocket at the trial, he could not be called upon to produce it unless he had received a notice in proper time. In *Cook v. Hearn* (c), *Patteson*, J., held that the attorney of the opposite party could not be asked whether he had with him a rule of court relating to the cause, with a view to give secondary evidence of it, no notice to produce or subpoena duces tecum having been served before the trial: and that such notice could not be given them. So, in *Bate v. Kinsey* (d), where an attorney refused to produce a document on the ground of his client's privilege, no notice to produce

(a) 4 Dowl. P. C. 656.

(b) 1 Stark. N. P. C. 283.

(c) 1 M. & Rob. 201.

(d) 1 C. M. & R. 33.

having been given, parol evidence of its contents was held inadmissible; and *Gurney, B.*, there says, "The fact of the instrument being in court makes no difference with regard to the necessity of a notice to produce."

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LORD ABINGER, C. B.—The only question in this case really is, whether the notice to produce was served in such proper time as would enable the party to produce the document if he had it. It appears that the defendant's attorney was in possession of the original bond, and that a copy was in town. The attorney who was served with the notice to produce must have known that Mr. Williams, who was the attorney for the defendant in the country, had possession of the bond. It would appear that the notice was merely given from over-caution, lest Mr. Williams, when called to produce it, should plead his client's privilege, and decline to do so. There was time enough for the attorney to consider whether it was for his client's interest to produce it or not, and no doubt he determined it was not. I therefore think the notice was sufficient, taking the fact into consideration, that the party on whom the notice was served knew that the instrument was in the possession of another person, who had been subpoenaed to produce it at the trial, and over whom his client had full authority. It is not like the case of a complicated deed, in which there are many parties, and which the attorney might refuse to produce, because he might think it necessary to take the opinion of his counsel before he produced it. This is the case of a simple bond of indemnity. I think, therefore, that the learned judge was quite right in admitting the secondary evidence, and that the rule ought to be granted.

PARKE, B.—I am of the same opinion. The question is now reduced to this, whether the notice to produce was sufficient. I agree that the principle to be extracted from the cases is, that notice to produce must be given within

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a reasonable time before the trial comes on, the judge at the trial being the proper person to consider whether that reasonable time has been given or not. I think in this case there was ample evidence to warrant the judge in deciding that the notice was sufficient, even on the principle contended for by Mr. *Kelly*—which however is not the principle laid down in the cases,—that it must depend upon the state of facts at the time the notice was given. Here it was given early on the Thursday morning, the case standing for trial on Friday. It is clear the defendant's attorney on the record, Mr. Leigh, well knew that the bond was in the possession of the former attorney, Mr. Williams, and that he would produce it at the assizes. At the very time he had the notice, he knew it was in the power of their own client, who had nothing more to do than to direct Mr. Williams to produce it. Even if the bond had not been at the time within the control of the defendant, but had afterwards come into his possession, or that of his attorney, so that it could have been produced on the trial, I by no means say that the notice would not in that case have been sufficient; but it is unnecessary to decide that. The cases referred to are all distinguishable. In the case of *Cook v. Hearn*, it was endeavoured to supply a want of previous notice, by giving it at the trial. That is no notice at all. In *Doe v. Grey*, the notice was served upon the wife, and not upon the attorney himself, and no proof was given that the attorney had received the notice, though there was proof that the deed was in his possession at the time. Here there was a notice to produce, given to the right party, and the sole question is, whether that has been given a reasonable time before the trial. I should have been sorry if this objection could have prevailed; and I think there is ample ground for holding that this was a sufficient notice, and therefore that the rule should be refused.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

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Nov. 5.

WEBBER v. SPARKES and Another.

TRESPASS for breaking and entering a certain close of the plaintiff, situate &c. [setting it out by abutments], and pulling down divers, to wit, four posts and four bars of the plaintiff, then standing and being in and upon the said close. The defendants pleaded, that there was a public footway over and across the said close in which, &c., wherefore the defendants, having occasion to use the said way, and because the said posts and bars had been and were wrongfully erected across the said footway, and obstructed the same, pulled down the said posts and bars, &c. Replication, traversing the public footway, on which issue was joined. At the trial before *Cresswell*, J., at the last Somerset assizes, the defendants proved a public right of footway across the plaintiff's field, but in a different direction from that in which the posts and rails had stood. It was contended for the plaintiff, that the plea was not proved unless a right of way were shewn to have existed in the line of the posts and rails, which the defendants alleged to have obstructed the way mentioned in the plea. The learned judge, however, was of opinion that the only matter in issue was, whether there was any right of footway across the close in question, and under his direction a verdict was found for the defendants.

Trespass for breaking and entering the plaintiff's close, (which was set out by abutments), and pulling down certain posts and bars standing thereon. Plea, that there was a public footway over the close, and that the defendants, because the posts and bars obstructed the way, pulled them down. Replication, traversing the footway:—*Held*, that on these pleadings the defendants were entitled to a verdict, on proof of a right of footway in any direction over the close, and were not bound to prove a way over the place where the posts and bars stood.

Erle now moved for a new trial, on the ground of misdirection.—In this case a locality was given by the declaration to the trespass complained of, and which must have been known to the defendants when they pleaded; i. e. where the posts and rails had stood, which were thrown down by them. The plea, therefore, was not proved by evidence of a right of way across another part of the close. The plea itself states that the way pleaded had been ob-

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structed by the posts and rails. [*Parke, B.*—But that is not parcel of the issue. Lord *Abinger, C. B.*—The plaintiff should have new assigned.] If he had, he would have admitted a right of way in the line of the posts and rails. [*Parke, B.*—He might have traversed and new assigned: then the question on the first issue would have been only whether there was a right of way across the close at all; if there was, but the defendants beat down the posts and rails in another part of the close, they would be liable on the new assignment.] The verdict is, that there is the right of way in the plea mentioned; namely, where the posts and rails were beaten down as obstructions of it: and the verdict would establish a right of way there. [*Parke, B.*—No; the only matter established by the record would be the existence of a right of way across the close. Lord *Abinger, C. B.*—It might be that the plaintiff stopped both the real way, and one which the defendants had usurped; as to the latter, there should be a new assignment.] That view of the case supposes that posts and rails existed in two places. The *close*, in the declaration, means the spot where the trespass was committed. Suppose it were a declaration for breaking and entering a close across the plaintiff's head-weir, and destroying that weir; would not that fix the trespass to that place? [*Parke, B.*—But here the declaration is for breaking and entering the close generally: then the defendants say, wherever that close is, there is a public way across it.] If the plaintiff had new assigned, he would have been bound to prove two trespasses of the kind charged, and therefore two sets of posts and rails: *Greene v. Jones* (a). The defendants fix the identity of the way by the description in their plea. In *Ellison v. Iles* (b), to a declaration in trespass for breaking and entering a close of the plaintiff,

(a) 1 Saund. 299 a.

(b) 11 Ad. & E. 665; 3 P. & D. 391.

described by abutments, the defendant pleaded a public right of way across the close; the plaintiff new assigned a trespass *extra viam*; to which the defendant pleaded, that the plaintiff had wrongfully stopped up the way in the former plea mentioned, wherefore the defendant necessarily went a little out of the said highway, *quæ est eadem*, &c. The evidence was, as in this case, that there was a public footway over the close, which the plaintiff admitted, and another footway which the defendant claimed as public, but which the plaintiff had stopped up; and it was proposed to try the question as to the existence of this latter right of way. The judge, however, thought that no issue was raised as to this second way, and directed a verdict for the plaintiff; and his ruling was confirmed by the court, on the ground that, the precise locality being material to the defence, the defendant was bound to shew it in his pleading. It was so held, because there was nothing either in the declaration or plea to shew the locality of the way claimed, and therefore the plaintiff had a right to fix which way was admitted by him. But here the declaration and plea together do fix the locality of the way to be where the alleged obstruction had stood and was removed.

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LORD ABINGER, C. B.—The mention of the posts and rails does not fix the locality of the trespass; if it did, the defendants would be entitled to a verdict on not guilty, unless it were proved that they came across that part of the close where the posts and rails were.

PARKE, B.—On this replication, the only question is, whether there is a right of way over the close—the piece of land—described in general terms in the declaration. If there be, but the trespass was committed out of the way, there should have been a new assignment. The declaration does not *describe* the close as being one whereon certain posts and rails were fixed, but merely alleges the breaking

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down of the posts and rails as part of the injury done by the defendants.

The other Barons concurred.

Rule refused.

Nov. 7.

CHEESE v. SCALES.

The defendant published a placard stating of the plaintiff, who was an overseer of the poor, "that when out of office he had advocated low rates, and when in office had advocated high rates, and that he (the defendant) would not trust him with 5*l*. of his property:"—

Held, that these words were actionable per se, without any innuendo.

An application to set aside the verdict and judgment, on the ground that the cause was tried after the return day mentioned in the *distringas juratores*, must be made within the first four days of term next following.

And *semble*, the Court will

not, in such case, interfere at all on motion, but leave the party to his writ of error.

The *distringas juratores*, instead of being made returnable on the first day of Michaelmas Term, was by mistake *tested* on that day, and commanded the sheriff to distrain the jurors, so that he might have their bodies on the 17*th* of June, before the Barons at Westminster, unless the Chief Baron should first come on the 15*th* of June, at the Guildhall of the city of London. The trial took place on the 25*th* of June. After error coram vobis brought by the defendant on the ground of this irregularity in the process, the Court, on motion, allowed an amendment.

LIBEL. The declaration stated that the plaintiff had been and was overseer of the poor of the parish of St. Mary, Stratford-le-Bow; and that the defendant published of and concerning him the libellous matter following:—"that the plaintiff, when out of office, had advocated low rates, and when in office had advocated high rates, and that he (the defendant) would not trust the plaintiff with £5 of his private property." Plea, not guilty. At the trial before Lord Abinger, C. B., at the sittings in London after last Trinity Term, the plaintiff obtained a verdict, damages 40*s*.

Crowder now moved in arrest of judgment, and contended that the language imputed to the defendant was ambiguous, and might mean either that the plaintiff was dishonest, or merely that he was negligent of his affairs; and therefore that it was not necessarily libellous, and ought to have been explained by an innuendo.

But **PER CURIAM**.—The publication imputes dishonesty to the plaintiff, or at least tends to disparage him; it was for the jury to say whether it was libellous or not, and they have found that it was. There is no ground for arresting the judgment.

Rule refused.

On a subsequent day, *Crowder* moved, in the same case, for a rule to shew cause why the verdict and judgment for the plaintiff, and all subsequent proceedings, should not be set aside, on the ground that there had been a mistrial. The *distringas juratores*, instead of being returnable on the 2nd of November, the first day of Michaelmas Term, was by mistake *tested* on that day, and commanded the sheriff to distrain the jurors, so that he might have their bodies on the 17th of June, before the Barons at Westminster, unless the Chief Baron should first come on the 15th of June, at the Guildhall of the city of London. The trial took place on the 25th of June. The informality was not discovered until the parties went before the Master on the taxation of the costs. In *Crowder v. Rooke* (a), where the trial was had after the day of *nisi prius*, it was held that the jurata was not amendable, and a *venire de novo* was awarded, on the ground that the trial had been had *coram non iudice*.

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PER CURIAM.—The motion ought to have been made within the first four days of the term ; but even if it had, it would probably not have been entertained. In *Gee v. Swann* (b), a motion was made within the first four days, to set aside the verdict for a similar defect, but the Court refused to grant a rule, leaving the defendant to his writ of error.

Rule refused.

The above rule having been refused, the defendant brought a writ of error *coram vobis* ; whereupon a cross motion was made by the plaintiff, to amend the *distringas juratores*, and a rule *nisi* was granted for that purpose, against which

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(a) 2 Wils. 144.

(b) 9 M. & W. 685.

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Crowder and Huristone shewed cause (November 24).—

This amendment cannot be made. At common law, amendments could be made only while the proceedings were in paper; and they can be made on the record only under the statutes of amendment, and for misprisions of the clerk. Now this is not a misprision of the clerk; it is a clear mistrial. To warrant the issuing of the *distringas*, there must be an award of the jurata; here they accord, but the objection is that the award of jurata is bad, and gave the judge no authority to try the cause. The *nisi prius* record is now the first entry of the proceedings in an action, and there is nothing to amend by. There are several cases to shew that an amendment of this nature cannot be made: *Com. Dig., Amendment (B.) and (C. 1)*; *Vin. Abr., Amendment*; *Child v. Harvey (a)*, *Crowder v. Rooke (b)*, *Blackmore's case (c)*, *Rogers v. Smith (d)*. In *Bullock v. Parsons (e)*, a bad *distringas* was amended by the venire, but there the latter was correct. *Sherman v. Tinsley (f)* may be cited for the plaintiff, but what was said there as to an amendment was a mere dictum, not necessary to the decision of the case. It is clear that this is not a case within the statute of *jeofails*.

Barstow, *contra*.—This is a mere misprision of the clerk. The proper return day, the 2nd of November, appears in the writ of *distringas*, but in the wrong part of it,—it is the teste instead of the return; and all that is sought is a mere transposition of the dates. *Dunbar v. Hitchcock (g)* shews how far the Court will carry the power of amendment of the record, even after error brought. Here the venire, which is the principal jury process, is perfectly correct, and the *distringas* may be amended by it. The jurata is not the award of the Court, but merely the act of

(a) 1 Salk. 48.

(b) 2 Wils. 144.

(c) 8 Rep. 156.

(d) 1 Ad. & E. 772; 3 Nev. &

M. 760.

(e) 2 Ld. Raym. 1143.

(f) 4 Scott, 286.

(g) 3 M. & Sel. 591.

the clerk. *Waldo v. Harrison* (a) is expressly in point to shew that such a defect as this is amendable. [*Parke, B.*—There the amendment was made on the supposition that the statute of 5 Geo. 1, c. 13, applied; but the authorities shew that it applies only to writs original and judicial, and not to jury process.] In *Bullock v. Parsons*, the amendment was not made at all under the authority of that statute. [*Parke, B.*—In Gilbert's History of the Common Pleas, p. 177, it is laid down that every defect is amendable, provided the venire and distringas are between the same parties and in the same cause.] In *Crowder v. Rooke*, the attorney had been apprised of the defect before the trial, and the amendment was refused mainly on that ground. *Rogers v. Smith* was decided on the statutes of jeofails.

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Cur. adv. vult.

On this day,

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LORD ABINGER, C. B., said—In the case of *Cheese v. Scales*, we are of opinion that the rule for the amendment ought to be made absolute. My brother *Parke* has looked into the authorities, and is prepared to state the reasons of our judgment.

PARKE, B.—[After stating the facts, he continued]: The question is, whether, according to the authorities, this amendment can be made.

This depends on the statutes of amendments, and not on the statutes of jeofails. By these statutes, and particularly the 8 Hen. 6, c. 12, the courts are empowered to examine and amend, in affirmance of the judgment, what they shall think in their discretion to be the misprision of their clerks, in any record, process, &c., writ, panel, or return; and these amendments may be made before or after error brought: but in order to amend on these statutes, there must be something to amend by.

(a) *Barnes*, 5.

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Now, in the present case, the *venire facias* is correct; it is made returnable immediately, as by the stat. 3 & 4 Will. 4, c. 67, s. 2, it may be. The writ of *distringas juratores* is incorrect; it commands the sheriff to have the bodies of the jurors in vacation, instead of the first day of the following term, and it is tested on the day on which it ought to have been returned. But these are evidently misprisions of the clerk, who is considered as having prepared and issued the writ; and the award of the jurata, which is to be considered as being on the plea roll, is sufficient to amend by, by altering the teste of the writ of *distringas*, and making the return the first day in the subsequent term. In substance this writ is right, and there is no mistrial, for the jury are to appear at Guildhall, if the Chief Baron should come there on *the 15th of June*: he did come on that day, they appeared there, and therefore they were properly summoned to try the cause, and the proper *judices facti*; and the other branch of the alternative, that of being brought to Westminster on another day, became nugatory. That the cause was in fact tried at an adjournment of the sittings begun on the 15th, and after the day when, in the event of not having appeared at Guildhall, they would have had to appear at Westminster, is immaterial.

And this amendment may be made consistently with the authorities.

In Gilbert's *Hist. of the C. P.*, p. 177, it is said, "If the *distringas* be omitted, or wrong in any of the particulars before mentioned, (including teste and return), it may be amended by the *venire*, for it is secondary process to bring in the jury."

In *Bullock v. Parsons* (a), a bad *distringas* appears to have been amended by the *venire*. So, in 2 Rolle's Reports, 111, such an amendment was made. In *Waldo v.*

(a) 2 Ld. Raym. 1143.

Harrison (a), the *distringas* was amended as to the return. In the second report of that case, it seems to have been a mistake to attribute that amendment to the stat. of 5 Geo. 1, which is a statute of jeofails; it must have been amended under the statutes of amendments. The cases relied upon by Mr. *Crowder* to the contrary are distinguishable. In that of *Crowder v. Rooke* (b), the cause was tried at a *subsequent sitting* to that at which the jury were to appear by the *distringas*, so that the jury were not properly summoned, and the proceeding was *coram non judice*. Here the cause was tried at the *same sitting*, before a jury properly summoned. On the same ground, the *distringas* was not amended in *Child v. Harvey* (c). The day appointed for the *nisi prius* was after the return in Banc, and impossible, and the Judge was held to have had no authority to try by a jury so summoned. The other case of *Rogers v. Smith* (d) was not a question on the statutes of amendments, but on the statutes of jeofails. Whether this defect would be aided on error, is not now to be decided.

The rule must be absolute on payment of the costs of the application and writ of error.

Rule absolute accordingly.

(a) Barnes, 5.
(b) 2 Wils. 144.

(c) 1 Salk. 48.
(d) 1 Ad. & E. 772.

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Nov. 8.

BRAYTHWAYTE v. GEORGE HITCHCOCK.

In debt for rent, stating a demise of a messuage &c. by the plaintiff to W. H., for one year, and so on from year to year if they should respectively please, at the yearly rent of 140*l.*, payable quarterly, and an assignment by W. H. to the defendant, the plaintiff proved an agreement (signed by himself only) for a lease of the premises by him to W. H. for seven years, at 140*l.* a year, that no lease had been actually executed, but that W. H. had entered into possession shortly after the date of the agreement, and had paid two quarters' rent, at the rate of 140*l.* a year:—*Held*, that this was sufficient evidence of a tenancy from year to year, as stated in the declaration, and in which W. H. had an assignable interest.

Where, on the non-production of a deed after notice to produce, the opposite party calls a witness who proves a copy compared by him with the original deed, such copy may be read without being stamped; for it is only used, in point of law, to refresh the witness's memory as to the contents of the deed.

DEBT for rent. The first count of the declaration stated a demise, on the 26th of October, 1840, from the plaintiff to William Hitchcock, of a messuage and premises, to hold for one year from the 25th of December then last, and so on from year to year if the plaintiff and the said William Hitchcock should respectively please, at the annual rent of £140, payable quarterly on &c.: that, during the said tenancy, to wit, on the 17th July, 1841, all the estate and interest of the said W. Hitchcock in the said messuage and premises came to and vested in the defendant, by assignment from the said W. Hitchcock: and alleged as a breach the nonpayment by the defendant of £35, a quarter's rent due at Christmas, 1841. There was also a count on an account stated.

The defendant pleaded, first, *nunquam indebitatus*; secondly (to the first count), a denial of the demise to W. Hitchcock; and thirdly (to the first count), a denial that the estate and interest of W. Hitchcock vested in him the defendant: on which issues were joined.

At the trial before Lord *Abinger*, C. B., at the Middlesex sittings after last term, the plaintiff put in evidence an agreement, dated the 17th December, 1840, and signed by the plaintiff only, whereby the plaintiff agreed to execute a lease of a cottage &c. to W. Hitchcock, for seven years, at a yearly rent of £140, payable quarterly. It was proved that no lease had been executed in pursuance of the agreement, but that W. Hitchcock had entered into possession of the cottage shortly after the date of the agreement, and had paid two quarters' rent up to Midsummer, 1841, at the rate of £140 a year. The plaintiff

then proved a notice to the defendant to produce a deed of assignment, bearing date the 17th July, 1841, of the cottage, from W. Hitchcock to the defendant: and on its nonproduction, called a witness, who produced a paper which he said was a true copy of the original assignment, which he had read and compared with it. It was objected that this copy could not be read in evidence for want of a stamp; but the Lord Chief Baron overruled the objection, and the copy was read: from which it appeared, that by the deed of assignment, which was executed both by W. Hitchcock and the defendant, after reciting the agreement of the 17th December, 1840, and that no lease had been executed in pursuance thereof, W. Hitchcock assigned to the defendant, his executors, &c., all the said agreement, and all benefit and advantage thereof, and all his estate, title, and interest therein, to hold to the defendant, his executors, &c., absolutely, subject nevertheless to a proviso for redemption. It was contended for the defendant, that there was no sufficient evidence of a demise whereby a tenancy from year to year was created, as alleged in the declaration. The Lord Chief Baron overruled the objection, and the plaintiff had a verdict for £35, leave being reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that there was no sufficient evidence of the assignment.

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Erle now moved accordingly for a rule to enter a nonsuit, and also for a new trial, on the ground that there was no sufficient evidence of a tenancy from year to year between the plaintiff and W. Hitchcock, or of the assignment of such an interest to the defendant.—First, the copy of the assignment was inadmissible for want of a stamp. The stamp acts, 44 Geo. 3, c. 98, sched. A, and 48 Geo. 3, c. 149, sched. I, part 1, impose a duty upon “every copy attested to be a true copy, in the form which hath been commonly used for that purpose, or in any other manner authenticated or declared to be a true copy, or made for the purpose of being given in evidence as a true copy, of any

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agreement, contract, bond, deed, or other instrument of conveyance, or any other deed whatsoever:" and there is a proviso, that all copies which shall at any time be offered in evidence, shall be deemed to have been made for that purpose. A stamp is therefore required for every copy of an instrument, before it can be read in evidence as such copy; the only exception to the rule being where the document is not read or receivable as such, but is used merely as a memorandum to refresh the memory of a witness.

Secondly, under the agreement recited in the deed, W. Hitchcock was a mere tenant at will, no lease having been executed, and there was not sufficient evidence from which to infer a demise from year to year, as alleged in the declaration. He had therefore no assignable interest in the premises.—He referred to *Brashier v. Jackson* (a).

Lord ABINGER, C. B.—I think the evidence was sufficient to shew a tenancy from year to year, under the agreement, which was duly executed by the plaintiff; the cases which have been decided on this point go fully that length. Here there is the additional fact of an admission under the defendant's hand, in the deed of assignment, that an agreement for the lease was executed by the plaintiff. But the plaintiff's case does not rest solely on the agreement to let; there is the fact of William Hitchcock having been in the possession of the cottage for more than a year, and having paid two quarters' rent under the agreement. William Hitchcock had therefore an assignable interest, which passed to the defendant under the deed proved at the trial. As to the other point, I think the provisions of the Stamp Acts relate only to such copies as are evidence per se, and that the word "copy" there means an *authenticated* copy, receivable as evidence in the first instance. Here the copy was evidence, only because the party who produced it had compared it with the original, and swore to the contents of it, word for word.

(a) 6 M. & W. 549.

PARKE, B.—I am of the same opinion. Although the law is clearly settled, that where there has been an agreement for a lease, and an occupation without payment of rent, the occupier is a mere tenant at will; yet it has been held that if he subsequently pays rent under that agreement, he thereby becomes tenant from year to year. Payment of rent, indeed, must be understood to mean a payment with reference to a yearly holding; for in *Richardson v. Langridge* (a), a party who had paid rent under an agreement of this description, but had not paid it with reference to a year, or any aliquot part of a year, was held nevertheless to be a tenant at will only. In the present case, there was distinct proof of the payment of rent for two quarters of a year. There is the additional fact of an occupation for more than a year; but in the case of *Cox v. Bent* (b), where a party, under an agreement for a lease, had occupied for more than a year, the Court held that a tenancy from year to year existed, not on the ground of the occupation, but because the party had during that occupation paid a half-year's rent. I think, therefore, the fact of such a payment was the stronger evidence in this case, and that William Hitchcock may be taken to have been a yearly tenant. Then, as to the question whether there has been a due assignment of such his interest, I think it is clear that there has; because, although the deed in its commencement recites only the agreement, the operative part of it conveys and assigns "all that the hereinbefore recited agreement of the 17th of December, 1840, and all benefit and advantage thereof, and all that and those the said messuage or tenement and premises at &c., and all the right, title, interest, property, claim, and demand whatsoever, at law or in equity, of him the said William Hitchcock in the said premises," &c. On the other point, I quite agree with my Lord Chief Baron that no

Exch. of Pleas,
1842.
BRAYTHWAYTE
v.
HITCHCOCK.

(a) 4 Taunt. 128.

(b) 5 Bing. 185; 2 M. & P. 281.

Exch. of Pleas, stamp was requisite, inasmuch as, though the document
 1842. might in form have been read as a copy of the original, it
 BRAYTHWAYTE was in truth read only as a memorandum to refresh the
 v. memory of the witness, who had compared it with the
 HITCHCOCK. deed.

GURNEY, B. concurred.

ROLFE, B.—If we look to the context of the schedule to the Stamp Act, it is evident that the word “copy” is not used in its ordinary sense; for a high rate of duty is first imposed on copies authenticated or attested for the security or use of any person being a party thereto, or taking any benefit or interest immediately under it; and afterwards a lower rate of interest is imposed, where the copy is made for the use of any other person not being a party thereto, or taking such interest or benefit.

Rule refused.

Nov. 8.

KELL v. ANDERSON.

By the stipulations of a charterparty, the vessel was to take in a cargo of coal at Newcastle, and proceed therewith to London, or as near thereto as

ASSUMPSIT on a charterparty, brought by the plaintiff, as owner of the ship *Union*, to recover £22 for the detention of the ship on demurrage for eleven days, at £2 per day. The defendant, as to ten days, denied the detention, and paid £2 into Court.

she could safely get, and deliver the same to the freighters or their assigns, &c.: to be delivered in five working days, demurrage over and above the said lying days 2*l.* per day. The vessel arrived in the port of London, off Gravesend, on the 9th March, and on the 10th the cargo was sold, and the vessel entered by the freighters for a meter. On the 20th she received an order from the harbour master to proceed to the Pool: on Monday, the 22nd, she commenced working out her cargo, and was cleared on the 27th. It appeared that in consequence of the factor's certificate that she was a metered vessel, the harbour-master had detained her at Gravesend till the 20th, when her turn arrived for her to proceed to the Pool and discharge her cargo; that if she had not been on the meter's list, this regulation would not have applied, and she might have proceeded to the Pool at once; that it was occasionally the practice for factors not to enter such vessels in the meter's list, but that it was desirable that the cargo should be sold, subject to metage, by a sworn meter:—

Held, that under these circumstances the vessel was not to be considered as having arrived at her place of discharge until the 20th, and therefore that the lying days did not begin to count till then.

At the trial, before Lord *Abinger*, C. B., at the London Sittings after last term, the charterparty was produced in evidence, and was as follows:—

Esch. of Pleas,
1842.

KELL
v.
ANDERSON.

“Newcastle-upon-Tyne, the 25th of February, 1841. It is this day mutually agreed between Mr. Edward Kell, owner of the good ship or vessel *Union*, himself master, of the burden of 141 register tons or thereabouts, now in the Tyne, and William Anderson, jun., agent to the af-freighters, that the said ship, being staunch and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Jarrow Quay, or as near thereto as she may safely get, and there load two keels of coals, and the remainder coke, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to London, or so near thereto as she may safely get, and deliver the same to the said freighters or their assigns, on being paid freight at and after the rate of £7 per keel for the quantity taken on board, and also all charges and expenses on the coals and coke, the ship paying trimming, pilotage, tonnage duty, delivery, (the act of God, the Queen’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind during the said voyage always excepted). The freight to be paid in cash for ship’s use, and remainder by the factor’s note at sixty days’ date, one market day to be allowed the said freighter (if the ship is not sooner despatched) for sale, the vessel to be delivered in five working days, demurrage over and above the said lying days £2 per day. Penalty for non-performance of this agreement £90. (Signed) William Anderson.”

It appeared that the vessel arrived in the port of London, off Gravesend, on the 9th of March, and on the 10th, being then ready to deliver her cargo, she was entered (as sold) for a meter. On the 20th she received an order from the harbour-master to proceed to the Pool, whither she

Exch. of Pleas,
1842.

KNLL
v.
ANDERSON.

proceeded accordingly; on Monday the 22nd she commenced working out her cargo, and was clear on the 27th. It was proved that, in consequence of the certificate of the factor that she was a metered vessel, the harbour-master had detained her at Gravesend until the 20th, when her turn arrived for her to proceed to the Pool and discharge her cargo; that if she had not been entered on the meter's list, this regulation would not have applied to her, and she might have proceeded to the Pool at once; and that it was occasionally the custom for factors not to enter vessels of small burthen and draught, such as she was, in the meter's list, in order to avoid the chance of delay, and ensure a speedy discharge of their cargoes. On the other hand, it was proved that it was desirable that the cargo should be sold subject to metage by a sworn meter, and that the defendant had notice of her arrival at Gravesend on the 10th of March, and sold the cargo accordingly on that day.

The Lord Chief Baron was of opinion, on these facts, that the ship had not arrived at the termination of her voyage until the 20th of March, and therefore the defendant was liable for demurrage for one day only, which was covered by the payment into Court; and he accordingly nonsuited the plaintiff, reserving leave to him to move to enter a verdict for £20.

Erle now moved accordingly.—The voyage ended, as far as the control of the master was concerned, on the 10th March, when the ship arrived in the port of London, at Gravesend. She had then, according to the terms of the charterparty, arrived "at London, or so near thereto as she might safely get." On that day the consignee had the perfect control of the vessel and cargo, and the detention complained of arose altogether from the defendant's having entered her name, for his own benefit, in the meter's list, whereby she had to wait her turn for a meter

till the 20th of March. The objection made on the part of the defendant at the trial was, that the ship had not until then arrived at her place of delivery: but the answer is, that as between the owner and the consignee, when she had arrived at a place within the port of London, ready to deliver her cargo, and where her subsequent movements were within the control of the consignee, that was virtually the place of delivery. What is the place of discharge must be construed with reference to the nature of the cargo, and to the usage of trade and the requisitions of the port as to such a class of vessels. In *Leer v. Yates (a)*, a general ship took brandies on board under bills of lading which allowed twenty lay days after arrival for delivery of the goods in London, and stipulated for the payment of demurrage at £4 a day after the expiration of that time. Some of the consignees choosing to have their goods bonded, the vessel was unable to make her delivery at the London Docks until forty-six days after the expiration of the twenty days; some of the goods, which were undermost, could not, although demanded, be taken out till the upper tiers were cleared. There it was held that each of those consignees was liable for demurrage for the forty-six days. There, no doubt, the vessel was actually in dock, but she could not come to the *actual place* of unloading. The general rule is laid down in Abbott on Shipping, p. 266, "that if the merchant covenant to do a particular act which it becomes impracticable for him to do, he must answer for his default, unless the act be or become contrary to the law of his country." That rule goes even further than the present argument requires. Here the ship was at her place of delivery, according to the reasonable meaning of the contract as between these parties, on her arrival at a place where she was under the control of the consignee, the defendant

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1842.

KELL
v.
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(a) 3 Taunt. 387.

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KELL
v.
ANDERSON.

himself being the cause of the subsequent delay, by choosing unnecessarily to have a meter.

LORD ABINGER, C. B.—I thought, that as no time was limited by the charterparty from which the demurrage was to be reckoned, it must be reckoned from the time of the ship's arrival at the ordinary place of discharge; and that if she was prevented from discharging sooner by the default of the defendant, that should have been the subject of an action on the case, and not of an action for demurrage. I still retain the opinion I had at the trial, that the days of demurrage must be counted from the time of the arrival of the vessel at the place of discharge, according to the usage of the port.

PARKER, B.—It appears to me that the question in this case is one of fact, namely, at what time the vessel arrived at her place of discharge, according to the usage of the port of London for such vessels. No doubt the general course of business of the port is to have a meter employed for such vessels; and the occasional practice of not entering small vessels on the meter's list is merely the exception to the rule. It is purely a question of fact, as to the proper construction of the charterparty. *Leer v. Yates* turned entirely upon the words "after arrival," by which the parties had bound themselves.

GURNEY, B.—I am of the same opinion. I think the time from which the days are to be calculated is the arrival of the vessel in the usual place of discharge for colliers; that is, in the Pool. If the parties mean otherwise, it is very easy for them to employ words to express their meaning.

ROLFE, B., concurred.

Rule refused.

Exch. of Pleas,
1842.

Nov. 10.

WILSON and Others v. WHITEHEAD, ACKERMANN, and
CARLETON.

ASSUMPSIT for goods sold and delivered, and upon an account stated. The defendants Ackermann and Carleton pleaded non assumpserunt, on which issue was joined; the defendant Whitehead pleaded his bankruptcy and certificate, and a nolle prosequi was entered as to him. At the trial before Lord Abinger, C. B., at the London Sittings after last Term, it was admitted that paper of the value of £298 had been delivered by the plaintiffs, who are wholesale stationers, to the defendant Whitehead, who carried on business as a printer under the name of Whitehead & Co., for the purpose of being used by him in printing the *Sporting Review*, of which publication he was part proprietor. In order to establish the joint liability with him of the other defendants, Whitehead's foreman was called, who stated that there had been a verbal agreement between the three defendants, that they should bring out and be jointly interested in the *Sporting Review*: Ackermann was to be the publisher, and to make and receive general payments, Carleton to be the editor, and Whitehead the printer; and after payment of all expenses, the three were to share the profits of the publication equally. Whitehead was to furnish the paper for the work, and charge it to the account at cost-price, and was also to charge the printing at "master's prices." He furnished accounts accordingly to Ackermann from time to time, but no settlement of accounts ever took place, nor were any profits ever realized from the work.

A., B., and C. verbally agreed that they should bring out and be jointly interested in a periodical publication. A. was to be the publisher, and to make and receive general payments, B. to be the editor, and C. the printer; and after payment of all expenses, they were to share the profits of the work equally. C. was to furnish the paper, and charge it to the account at cost prices. No profits were ever made, nor any accounts settled. The plaintiff furnished paper to A., for the purpose of being used by him in printing the periodical:—*Held*, that B. and C. were not jointly liable with A. for the price of it.

On this evidence, the Lord Chief Baron was of opinion that the other defendants were not jointly liable with Whitehead in this action, and accordingly directed a nonsuit, giving the plaintiffs leave to move to enter a verdict for £298.

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1842.

WILSON
v.
WHITEHEAD.

W. H. Watson now moved accordingly.—The agreement proved at the trial, by which the defendants were to be jointly interested in the profits of the work, constituted a partnership between them in respect of it, and made them all liable, when the partnership was discovered, for goods supplied to any of them for the purposes of the work: *Saville v. Robertson* (a), *Gouthwaite v. Duckworth* (b). [*Parke, B.*—The question is, did the other defendants authorize Whitehead to purchase the paper on their account, or on his own? It appears to me, on the true construction of the contract, that the latter was the case. When the paper was in his possession, he was at liberty to have appropriated it to any other purpose than to the *Sporting Review*. This is very much like the ordinary case of coach proprietors, where each horses the coach for one or more stages, and each agrees to bring into the concern the work and labour of his horses, and none of the others has any interest in them, though all share in the profits.] Those cases proceed on the ground that it is notorious to all that each does so work with his own horses. [*Parke, B.*—Not at all; but on the ground that such is the authority given. So here, on the true construction of the agreement, the view taken by my Lord at the trial was perfectly correct; the agreement is that Whitehead shall furnish the paper on his own account.]

LORD ABINGER, C. B.—I retain the opinion which I expressed at the trial.

PARKE, B., GURNEY, B., and ROLFE, B., concurred.

Rule refused.

(a) 4 T. R. 720.

(b) 12 East, 421.

HAWLEY v. CADBURY.

Exch. of Pleas,
1842.

Nov. 10.

ASSUMPSIT for money had and received, and on an account stated. Plea, non assumpsit. At the trial, before the Secondary of London, the case for the plaintiff was stated to be, that he the plaintiff, the defendant, and other persons, being creditors of one Sollinger, a grocer and cheesemonger, who was in embarrassed circumstances, Sollinger made an assignment of his stock in trade, fixtures, &c. to the defendant, who was either to carry on the trade for the benefit of the creditors, or to sell and distribute the proceeds among the creditors. The business not being adequate to meet the expenses of carrying it on, the defendant sold the stock in trade, &c., which realized 2*s.* 6*d.* in the pound on the gross amount of the debts; and the defendant expressly promised the plaintiff to pay him his proportion of the composition, amounting to 5*l.* 5*s.*, but had failed to do so, and this action was brought to recover it. To prove this case Sollinger was called as a witness by the plaintiff. It was objected for the defendant that the witness was incompetent, inasmuch as by a verdict for the plaintiff his debt would be diminished pro tanto. The objection was overruled, and the plaintiff had a verdict, damages 5*l.* 5*s.*

S., being in insolvent circumstances, assigned his effects to the defendant, in trust to sell, and distribute the proceeds rateably among his creditors, of whom the plaintiff was one. The sale realized 2*s.* 6*d.* in the pound on the amount of the debts, and the defendant promised the plaintiff to pay him his proportion:—*Held*, in an action for money had and received, brought by the plaintiff against the defendant to recover such proportion, that S. was a competent witness for the plaintiff.

Willes now moved for a new trial.—The witness was incompetent. By the plaintiff's succeeding, he would get clear of the composition of 2*s.* 6*d.* in the pound on his debt: he had therefore an interest in the result of the suit, independently of the verdict's being evidence in a subsequent action as between him and the defendant. The defendant having expressly agreed to pay the plaintiff the 2*s.* 6*d.* in the pound, the witness could not afterwards recover it back from the defendant. [Lord Abinger, C. B.—Supposing A., owing B. money, pays it to a banker to pay over to B., may not B. sue the banker for it, and call A. as a witness?] Not where the banker has entered into a

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1842.

HAWLEY
v.
CADBURY.

binding agreement with B. to pay it to him. [*Parke, B.*—It seems to me that the witness stands indifferent, for that if the plaintiff fails, the witness may nevertheless recover against the defendant. If the plaintiff succeeds, the witness may receive a benefit; but if he fails, he will sustain no detriment. Lord *Abinger, C. B.*—It is like the case of the drawer of a bill, called by the indorsee.] The plaintiff must make out that the defendant is bound to pay him, or he must fail altogether: but if the defendant has so bound himself, that engagement releases him from an action by Sollinger. [*Parke, B.*—The mere promise is nothing, unless a consideration be shewn, by the funds being put into the defendant's hands; then Sollinger is called to prove that; but the result of the action does not affect his rights against the defendant.]

PER CURIAM (a),

Rule refused.

(a) Lord *Abinger, C. B., Parke, B., Gurney, B., and Rolfe, B.*

Nov. 15.

CLOWES v. BRETTELL.

The stat. 4 & 5 Vict. c. lxxxix, enables the "Patent Rolling and Compressing Iron Company" to sue and be sued in the name of their secretary; and enacts, that every judgment, &c., shall and may be lawfully executed against, and have the like effect upon, the person and estate of every individual shareholder, as if he had been by name a party to the proceedings: provided, that no execution against any person being or having ceased to be a shareholder shall be issued without leave first granted by the Court in which the judgment, &c., shall have been obtained, upon a motion in open Court, and after notice of such motion given to the person to be charged:—*Held*, that such execution could not be issued against an individual shareholder merely on motion, but that there must also be a previous *scire facias*.

IN this case *Willes* obtained a rule, calling upon one *Welby* to shew cause why execution should not issue against him or his goods, under the following circumstances.—By an act of Parliament of the 4 & 5 Vict. c. lxxxix, whereby "The Patent Rolling and Compressing Iron Company" are enabled to purchase certain letters patent, and to sue and be sued in the name of their secretary, it is enacted, by sect. 11, that "every judgment, &c., should and might be lawfully executed against, and (subject to

Held, also, that such execution might be had upon a judgment in an action brought against the secretary, for work done for the Company, on his order, before the passing of the act.

certain restrictions) should have the like effect upon, the person and estate of every individual shareholder, as if he had been by name a party to such proceedings." And sect. 12 enacts, that it shall be lawful for the plaintiff to cause execution issued upon any judgment obtained against the nominal party "to be issued against all or any of the shareholders for the time being of the company; and if such execution shall be inefficient to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to cause execution to be issued against any person who was a shareholder of the company at the time when the contract was entered into upon which such action or suit shall have been instituted: Provided always, that no such execution against any person being or having ceased to be a shareholder shall be issued without leave first granted by the Court in which such judgment, decree, or order shall have been obtained, upon a motion in open Court, and after notice of such motion given to the person sought to be charged." In this case the action was brought to recover the expenses of printing advertisements, notices, &c., for the company, on the order of the secretary, before the passing of the act of Parliament. The plaintiff had issued execution against the secretary, but such execution had proved ineffectual. Welby was a shareholder of the company at the time of the judgment, and at the time when the goods were supplied, and notice of this application had been given to him.

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1842.

CLOWES
v.
BRETTILL.

Peacock shewed cause in the first instance.—In the first place, no execution can issue against a shareholder merely as such, without a previous *scire facias*; *Ransford v. Bosanquet* (a). The terms of this act of Parliament are substantially the same as those of the 7 Geo. 4, c. 46, s. 9. And it makes no difference that here the party to be affected by the judgment is, by the act, to have notice of the motion

(a) 12 Ad. & E. 813; 2 G. & D. 324.

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1842.

CLOWES
v.
BRETTILL.

for leave to issue execution : a scire facias is equally necessary ; *Eardley v. Law* (a).

But, secondly, this is not a case in which execution ought to issue at all against an individual shareholder. Here the action is brought for charges incurred before the passing of the act. That is a case provided for by the 32nd section, which provides that all the costs and expenses attending the applying for, obtaining, and passing the act shall be paid out of the funds of the company, in preference to all other payments whatsoever. In *Carden v. The General Cemetery Company* (b), where the act of Parliament constituting the company contained a similar provision, it was held that the plaintiff (although himself a member of the company) might sue the company in debt for his time and trouble, and money expended, in obtaining the act. The object of the act of Parliament was to give a remedy for a claim of this kind against the funds of the company, not against an individual shareholder. [Lord Abinger, C. B.—If the act had not passed, the plaintiff would have had a right to sue every subscriber who could be fixed for the amount of the goods supplied by him.] By sect. 13, every person against whom any such execution shall have issued as mentioned in sect. 12, shall be reimbursed out of the funds of the company, or by contributions from the other shareholders: sect. 14 gives him a remedy over, in case he be not reimbursed within fourteen days, by execution upon the same judgment against the property of the company; and then by sect. 15, if he be not fully paid by those means, he may divide the amount not reimbursed to him into as many equal parts as there are then shares in the capital of the company, and every shareholder for the time being is to be liable in respect thereof, according to the number of his shares. So that, if an execution were to go against Mr. Welby, he may divide the amount under s. 15, and

(a) 12 Ad. & E. 803 ; 4 P. & D. 379.

(b) 5 Bing. N. C. 258 ; 7 Scott, 97.

compel payment from the members of the company, although they were not shareholders at the time when the goods were supplied. That would be inconsistent with the proviso in sect. 12, that no shareholder shall be liable for any other or greater sum than might have been recovered if the act had not been passed. [Lord *Abinger*, C. B.—The shareholders must look to it, and, before they subscribe, see in what state the company is. The act makes this a debt of the company.]

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1842.

CLOWES
v.
BRETTELL.

Willes, contra, urged that execution ought to issue in the first instance, without a scire facias, inasmuch as the 11th section enabled the party to have execution against the person and estate of every shareholder, as if he had been by name a party to the proceedings.

PER CURIAM.—We think there should be a scire facias, and then, if any point can be raised on the construction of the act of Parliament, it may be raised upon the scire facias, and solemnly determined.

Rule accordingly (*a*).

(*a*) See *Wingfield v. Barton*, 2 Dowl. P. C. (N. S.) 355.

PRATT v. DELARUE.

Nov. 17.

IN this case the action was commenced on the 6th of October: on the 15th, the plaintiff obtained an order to sue in formâ pauperis. An order was afterwards made by Lord *Abinger*, C. B., allowing the defendant a month's time to plead. The plaintiff took out a summons before *Rolfe*, B., to rescind that order, and after hearing the parties, the learned Baron (not being aware that the plaintiff was suing in formâ pauperis) ordered that the summons should be

A plaintiff suing in formâ pauperis is exempted from the payment of interlocutory equally as of final costs.

Each. of Pleas, refused, "with costs to be taxed by the Master, and paid
1842.
by the plaintiff."

PRATT

v.
DELABUE.

Horn having obtained a rule to shew cause why the order should not be amended, by striking out the latter words,

Otler now shewed cause.—There is no distinction between a pauper plaintiff and any other, in regard to the power of a judge at chambers to impose costs. At common law, neither plaintiff nor defendant obtained costs; but by the stat. of Gloucester, 6 Ed. 1, costs were given to the plaintiff in all cases where he obtained damages. Now these costs may be divided into two portions, the one consisting of court fees and the fees to counsel and attorney; the other of the costs incidental to the prosecution of a suit. By stat. 11 Hen. 7, c. 12, a pauper plaintiff was exempted from the payment of the first portion; and after the passing of that statute, if a pauper succeeded, he would recover both descriptions of costs from the opposite party; if he failed, he was exempt from payment of the court fees and fees to counsel and attorney, and he paid no costs to the opposite party, because at that time a defendant, though he succeeded in the suit, got no costs. To remedy this the stat. 23 Hen. 8, c. 15, was passed; and by the first section of this statute, a defendant was entitled to his costs where the plaintiff was nonsuited or a verdict went against him. Now the words of this clause being general, a pauper plaintiff would have been liable to costs, if he were nonsuited or a verdict went against him; but then the second section enacts, that provided he were admitted to sue in formâ pauperis at the commencement of the suit, he shall not be liable to the costs imposed by virtue of that statute; viz., in the case of his being nonsuited, or a verdict being obtained against him. If therefore a pauper plaintiff were admitted before the commencement of the suit, he was exempt from payment

of court fees, and fees to counsel and attorney, by stat. 11 Hen. 7, and he came directly within the exemption of the second section of 23 Hen. 8; if he were admitted after the commencement of the suit, then he was still exempt from payment of the fees under stat. 11 Hen. 7, but he would be liable to pay the costs to the opposite party, if he were nonsuited or a verdict went against him. It is admitted that a pauper may be admitted to sue, and so entitled to all the benefits of the stat. 11 Hen. 7, either before or after the commencement of the suit. Now in this case the action was commenced on the 6th October, and the plaintiff was not admitted a pauper until the 15th. It is submitted, therefore, that there is no distinction between a pauper and any other person as to his liability to costs in such a case, upon a consideration of the statutes. Then as to the practice. It is certainly generally stated in the books of practice, that a pauper may recover costs though he pays none; but it is submitted that the proposition must be limited to that portion of the costs which consists of court fees and fees to counsel and attorney: for the reason of this proposition is given in 1 Eq. Cas. Abr. 125, and 3 Bla. Com. 400, that the counsel and clerks are bound to give their labour to him, but not to his antagonist. The cases also which are usually cited in support of this proposition, do not support it. *Rice v. Brown* (a) only shews that a pauper shall recover his costs if he succeed; and the case of *Blood v. Lee* (b) was adjourned, and even if were considered as a decision, it does not appear from the report whether the pauper was admitted before or after the commencement of the suit; and upon the distinction above taken, this circumstance would be all important.

Exch. of Pleas,
1842.

PRATT
v.
DELAWARE.

Horn, contra.—The uniform practice for several centuries has been for paupers to be exempted from the payment of

(a) 1 Bos. & Pull. 39.

(b) 3 Wils. 24.

Exch. of Pleas, costs, without any distinction between interlocutory and
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v.
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final costs; and the court will not disturb that practice, merely because they think that the language of ancient statutes, if subjected to strict verbal criticism, will not support it to the letter. Long usage, in matters of this nature, has the effect of a binding decision. Before the rule of H. T. 2 Will. 4, the mode of punishing a pauper for any misconduct in the course of the cause was by dispaupering him; and the power thereby given to the Court, of inflicting costs on a pauper plaintiff in the case there mentioned, shews that, in the opinion of those who framed the rule, no such power existed before. It must now be considered as settled, since the case of *Casey v. Tomlin (a)*, that the admission to sue in formâ pauperis after the commencement of the suit makes no difference as to the right of the pauper to be exempted from the payment of costs (b). But even admitting that he may be subject to interlocutory costs, he ought at all events, by analogy to the rule of H. T. 2 Will. 4, to be called upon by a rule to shew cause why he should not pay them.

LORD ABINGER, C. B.—Undoubtedly, if our decision in this case depended solely upon the wording of the statute of 23 Hen. 8, I should think that a pauper would not be protected thereby from the payment of interlocutory costs, for costs in the cause would, as it seems to me, mean final costs. But the practice of exempting a pauper from the payment of all costs has now become so inveterate that it cannot be disturbed. When a pauper has misconducted himself in the course of a cause, the proper mode of subjecting him to the payment of costs is by dispaupering him. That has undoubtedly been the established practice, and is recognized by one of the cases which has been referred to, decided by the Court of Common Pleas, when

(a) 7 M. & W. 189.

(b) See the next case.

Mr. Justice *Buller* had a seat in that court (a). It is not for us to overturn a solemn decision of that kind. The rule will therefore be absolute, but without costs, for setting aside so much of my brother *Rolfe's* order as subjects the plaintiff to the payment of costs.

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PARKE, B.—It appears to me that this question does not turn on the construction of the statute, which applies only to costs payable between party and party at the termination of the suit. This is a case of interlocutory costs, which stands upon an entirely different footing. It has certainly been a long-established practice, that a pauper shall pay no costs whatever; and the principle on which it rests was doubtless this, that it would be a great wrong to compel a person to pay costs who is totally destitute of money. This practice, I think, we cannot now overturn. But then a rule of Court has been made, which directs “that where a pauper omits to proceed to trial pursuant to a notice or undertaking, he may be called upon by a rule to shew cause why he should not pay costs, though he has not been dispaupered:” and the question arises, whether by that rule the practice has been so far altered, as that the Court has now a general power of inflicting interlocutory costs, the two instances mentioned in the rule being put merely by way of examples; or whether the power is to be restricted to those particular instances. I think it must be considered as confined to the particular instances mentioned in that rule, and that we cannot, until some further rule be made on the subject, sanction an order which compels a pauper to pay interlocutory costs.

GURNEY, B., concurred.

ROLFE, B.—When I made the order, I certainly was

(a) *Rice v. Brown*, 1 Bos. & Pul. 39; ante, p. 511.

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not apprised that the plaintiff had been admitted to sue as a pauper, or I should not have made it. At the same time, I must regret that there is no jurisdiction to inflict interlocutory costs; for although the nonpayment of costs by a pauper has a popular sound, and may in some cases be extremely proper, it certainly is often made the means of great oppression. In the present case, for instance, the plaintiff had misconducted himself by not attending before the Judge, although he was twice summoned. However, as the established practice has been not to inflict costs, I agree that the rule must be absolute to set aside that part of the order.

Rule absolute accordingly.

Nov. 24.

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A person admitted to sue in formâ pauperis after the commencement of the suit, is liable, on non-suit or verdict for the defendant, to the costs antecedent to the date of the order.

THE Court having discharged with costs (a) the rule which had been obtained by the defendant in this case, for setting aside the order of *Alderson*, B., admitting the lessor of the plaintiff to sue in formâ pauperis after the commencement of the suit, the latter taxed his costs of opposing that rule, which were allowed at the sum of 10*l.* 1*s.*, and the defendant tendered to the Master his bill of costs in the cause, amounting to 25*l.* 10*s.* 10*d.* The Master being of opinion that the order to sue in formâ pauperis did not exempt the plaintiff from the payment of the costs incurred prior to the date of the order, allowed the defendant the sum of 17*l.* 3*s.* 6*d.* for such costs, and 1*l.* 12*s.* 8*d.* for the costs of taxation, and made out an allocatur for the amount of these two sums, 18*l.* 16*s.* 2*d.*, in favour of the defendant.

(a) See 9 M. & W. 455.

Townsend obtained a rule, calling on the defendant to shew cause why this allocatur should not be set aside as being irregular, and why the defendant should not pay the costs of this application.

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Jervis now shewed cause.—The question in this case is, whether an order to sue in formâ pauperis, obtained after the commencement of the suit, exempts the plaintiff from antecedent costs. The cases on this subject at common law exhibit some contradiction, the true view of the statutes not having been brought before the Court. The 11 Hen. 7, c. 12, which conferred the right to sue in formâ pauperis, enacts, “that every poor person or persons which have or thereafter shall have cause of action or actions against any person or persons within this realm, shall have, by the discretion of the Chancellor of this realm for the time being, writ or writs original and writs of subpoena, according to the nature of their causes, therefore nothing paying; and after the said writ or writs be returned, &c. the justices shall assign to the same poor person or persons counsel learned &c., and shall appoint attorney and attorneys for the same poor person or persons, &c. &c.” At the time of this enactment, a plaintiff paid no costs to the defendant, but he paid the fees of court, and to counsel and attorney. From this the act relieves him, if he is a poor person, whether admitted so to sue at the commencement of the suit or afterwards. Then the stat. 23 Hen. 8, c. 15, first gave a defendant, in case of a verdict for him or a nonsuit, costs against a plaintiff; and the second section, upon which the present question arises, enacts that all poor persons, plaintiffs, “which at the commencement of their suits or actions shall be admitted to have their process of charity,” &c. “shall not be compelled to pay any costs by virtue and force of this statute.” It is a proviso excepting from the general operation of the statute the persons mentioned therein, and them only, viz., those plaintiffs

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who are admitted to sue as paupers at the commencement of their suits. On the equitable construction of this statute (although in the cases of *Foss v. Racine* (a), and *Love-well v. Curtis* (b), it was doubted by this Court), it must now certainly be taken as being established, since the cases of *Casey v. Tomlin* (c), and *Brunt v. Wardle* (d), that even where the party is admitted after the commencement of the suit, he is *from that time* exempted from the payment of costs. But all the cases leave the present point untouched. There are indeed some old authorities, in which it is laid down that a pauper pays *no* costs, but in none of them was the point now in question presented to the consideration of the Court; and the rule of this Court of the year 1717 (Com. Dig. Formâ Pauperis, (A.)) is express, that "if admitted after the commencement of the suit, the pauper is to give security to pay the costs before admittance." If the pauper was altogether exempt from the payment of costs, the Court would have had no authority to make such a rule. In *Langley v. Blackerby* (e), this point did not arise. In *Blood v. Lee* (f), which was merely an application to the discretion of the Court to discharge the plaintiff out of custody, the question was adjourned, and it does not appear to what conclusion the Court came. In *Oats v. Holliday*, there cited, the Court certainly are said to have resolved, that a person admitted to sue in formâ pauperis pendente lite "shall not pay costs from the beginning of the action." On what ground that case was put does not appear: if the question was when the party could be admitted a pauper, the dictum as to the effect upon the costs was merely extrajudicial. But there are some authorities in equity expressly in point for the defendant; and the statute applies equally to courts of equity as of common law. In an anonymous case in *Moseley's Reports*, 68, it

(a) 4 M. & W. 610.

(b) 5 M. & W. 158.

(c) 7 M. & W. 189.

(d) 4 Scott, N. R. 188.

(e) Andr. 308.

(f) 3 Wils. 24.

was expressly decided that a pauper admitted after the commencement of the suit was liable to antecedent costs. The same principle was recognised in the cases of *Wilkinson v. Belsher* (a), and *Nash v. Yorston* (b). And in *Davenport v. Davenport* (c), the present Lord Chancellor says, "The plaintiff then proceeds with the suit, and afterwards obtains the common order to sue in formâ pauperis, which does not affect costs incurred previously, and up to the date of that order, and for payment whereof by the plaintiff to the defendants a distinct order was made by the court."

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Townsend, in support of the rule.—So long as the order allowing the plaintiffs to sue in formâ pauperis remains in force, he is exempt from the payment of all costs. The true construction of the statutes is laid down in the judgment of the Court of Common Pleas, in *Brunt v. Wardle*. *Tindal*, C. J., there says, "The statute 11 Hen. 7, c. 12, is an enabling statute, meant to confer a boon on the poor—its title being 'A mean to help and speed poor persons in their suits;' and therefore, unless it in express terms or by necessary implication requires that the party shall only be admitted to sue as a pauper before he commences his suit, we have no right to import into it any such condition. I find in the act no words expressive of any such intention on the part of the legislature; and certainly there can be no good reason why a man who has fallen into poverty while the suit is proceeding, should be shut out from the benefit of the statute." His Lordship then refers to the statute of 23 Hen. 8, c. 15, s. 2, and observes upon it, that "the proper construction of that clause is, that, though it may place parties suing in formâ pauperis in a less favourable position where they are admitted so to sue pendente

(a) 2 Bro. Ch. Ca. 272.

(b) 4 Law Jour., N. S., Chanc. 86.

(c) 1 Turner & Phillips, 124.

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lite, it does not deprive them of the benefit of the former statute." And *Maule, J.*, referring to the cases of *Foss v. Racine* and *Lovevell v. Curtis*, says,—“The attention of the Court was not in those cases called to the undoubted common-law authority of the Court, to admit parties to sue and defend in formâ pauperis.”

The words of the statute of Hen. 8, “at the commencement of the suit,” cannot properly be interpreted to mean *before* the commencement of the suit, nor can they mean, strictly, *simultaneously with* it. It is a case analogous to those decided upon the statutes relating to costs, 22 & 23 Car. 2, c. 9, and 3 & 4 Vict. c. 24, s. 2, the words in which, “immediately afterwards,” have been construed to include a reasonable time after the verdict: *Thompson v. Gibson* (a). So, when the statute 2 Geo. 2, c. 28, s. 8, enables certain persons prosecuted by capias to defend in formâ pauperis, and directs the judges “according to their discretion, to admit such person to defend himself against such action or information, in the same manner and with the same privilege as the judges of such court are by law directed and authorized to admit poor subjects to *commence* actions for the recovery of their rights,”—the words “to commence actions” cannot be construed literally, because, for upwards of a century before that act passed, it had been the constant practice to admit persons to sue in formâ pauperis after the commencement of the suit. The admission, indeed, must be after the actual commencement of the suit, because until the writ has been issued the Court has no cognizance of the cause. Therefore, in the form of a petition for an order to sue in formâ pauperis, it is stated that “the defendant is jointly indebted unto your petitioner for goods sold, &c. &c., and your petitioner *hath commenced* an action against him for the same” (b). *Langley v. Blackerby* and *Brittain v. Greenville* (c) are in

(a) 8 M. & W. 281.

(b) Tidd, App. 17.

(c) 2 Str. 1121.

favour of the view contended for by the lessor of the plaintiff. [*Rolfe*, B.—If you are right, you mislead a defendant greatly in the conduct of his case: he would resist many things, if he knew the plaintiff was suing in formâ pauperis, which he allows to go on, under the expectation that he shall obtain costs. A defendant would never force a pauper plaintiff on. *Parke*, B.—If you can shew that the cases have put a uniform construction upon the statutes, we must bow to their authority; otherwise the reasonable construction certainly is, that the party should not be exempted from all costs, unless he were admitted at the commencement of the suit—that is, as soon as the judges could admit him.] *Oats v. Holiday* is an express authority for the plaintiff. *Blood v. Lee* is to the same effect, and recognises the principle that a pauper plaintiff is exempt from all costs; it was not adjourned on this point, but on the question whether the plaintiff was entitled to be discharged out of custody, he being in execution upon a judgment of nonsuit.—[He referred also to *Jones v. Peers* (a), *Gibson v. M'Carty* (b), *Sloman v. Aynel* (c), and *Morgan v. Eastwick* (d).] Costs in equity stand upon a different footing; see *Corbett v. Corbett* (e), *Beames on Costs*, 112.

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LORD ABINGER, C. B.—The question is, whether a person admitted to sue in formâ pauperis, after the suit has made some progress, is by virtue of that admission to be exempted from paying to the defendant costs incurred antecedently, and due from him at the time of his admission so to sue. If the cases had laid down any fixed rule upon the subject, I should have said that it is now too late to overrule them by putting a new construction on the statute; but where

(a) *M'Clel. & Y.* 282.

(d) 7 *Dowl. P. C.* 543.

(b) *Cas. temp. Hardw.* 311.

(e) 16 *Ves.* 407.

(c) *Fortesc.* 320.

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the cases are not sufficiently strong, either from their terms, their number, or their authority, to fetter our judgment, we are at liberty to put the best construction we can upon these acts of Parliament. If we look at the statute of Hen. 8, I think there can be no doubt that the intention was to give a successful defendant costs against the plaintiff, and that the act makes an exception only in favour of paupers admitted at the commencement of the suit. There is a good reason for that distinction; because, as it is now conceded that a person might be admitted to sue in formâ pauperis at any time before, or even after trial, and he would in such case have the full benefit of the statute of Hen. 7, as to court fees and fees to counsel, it became a question whether the legislature should exempt the pauper from paying the defendant's costs in all cases, whether admitted before, at, or after the commencement of the suit; and therefore they used these words; which I cannot interpret in any other way than according to their ordinary meaning, nor can I see how the word "at" can be construed "after." A person admitted *before* the commencement of the suit, may, in one sense, be said to be admitted *at* the commencement of the suit; but it is difficult to see how a person admitted *after* the commencement of the suit, can be said to be admitted at its commencement. The ingenious interpretation put upon these statutes by the plaintiff's counsel rests upon a mere fallacy. The word "at" in the statutes relating to costs, which have been referred to, is only used to identify the character of the person who is to certify; that is, he must be the judge who presides "*at* the trial." But here the words "at the commencement of the suit" have reference to time, and can only apply to a person admitted before or at the commencement of the suit. By an equitable interpretation of the statute of Hen. 7, when a party is once admitted, he is not thereafter liable to costs under the statute of Hen. 8; but he is not therefore exempted from the payment of costs incurred previously

to his admission. The lessor of the plaintiff was therefore liable to those costs, and this rule must be discharged.

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PARKER, B.—I am of the same opinion. The question turns upon the proper interpretation to be put upon the second section of the 23 Hen. 8, c. 15; the action of ejectment, though not provided for by that statute, being placed on the same footing as other actions by the stat. of 4 Jac. 1, c. 3. We are called upon, therefore, to put a construction upon the stat. of Hen. 8; and the question is, whether or not the second section applies to a pauper not admitted at the commencement of the suit. It is our duty to construe the statute according to the grammatical meaning of the words, unless some absurdity would ensue from so construing it, or an uniform series of decisions had already established a particular construction. I do not think any of the cases cited of sufficient weight to preclude us from putting our own construction on the words of the statute. The principal authority is that of *Oats v. Holiday*, which is cited in *Blood v. Lee*. In the latter case the point was not decided, and in the former the *decision* was only that a party might be admitted after the commencement of the suit. That undoubtedly was the principal point decided, but it is said that “the Court resolved that a person so admitted should not pay costs from the beginning of the action.” What is the true meaning of that resolution is left in doubt; probably, that he was not bound to pay *the whole* costs from the commencement of the action. And such is the construction which we put upon the statute; that if a pauper be admitted after the commencement of the suit, he shall not be bound to pay all the costs, but shall be exempt from those incurred subsequent to his admission. There is now no doubt that a party may be admitted to sue in formâ pauperis after the commencement of the suit, and it is clear, from the current of authorities, that we were correct in so deciding; but the question is as to the

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effect of such an admission as respects the payment of costs. By the second section of the stat. of Hen. 8, a pauper is exempt from costs only in the event of his being admitted at the commencement of the suit, that is, as soon as the Court or Judge had jurisdiction to admit him. The statute gives a total exemption from the costs only in case of an admission at the commencement of the suit; if admitted after, then, on the equitable construction of the act, it seems reasonable that he shall not be liable to the payment of the whole costs, but only to those incurred up to the time of his admission. In this case we must therefore hold, that the lessor of the plaintiff is not altogether exempt from costs, but is liable to pay the costs incurred by the defendant up to the time of his admission to sue in formâ pauperis; and it is reasonable also that he should pay the costs of the taxation.

GURNEY, B.—I think my learned brothers have put the true construction on the act of Parliament, and it is undoubtedly that which meets the justice of the case.

ROLFE, B.—I entirely concur. Looking at the language of the second section of the statute of Hen. 8, the first observation that occurs is, that if you follow the *words* of that act, it does not exempt this lessor of the plaintiff from the payment of *any* costs; because, in terms, it only exempts persons admitted to sue in formâ pauperis at the commencement of the suit. But then it is said, that the Court should adopt an equitable construction, and that by such construction a pauper should be wholly exempt. I agree that it is reasonable to adopt an equitable construction; that is, such a construction as shall really do equity, not such as shall favour one party, where the statute itself has not favoured him, at the expense of the other. The statute says that a pauper shall be exempt from the payment of costs, if admitted at the commencement of the suit; but

we are asked to leave out the words "at the commencement of the suit," and to say that he is exempt whenever admitted. It is equitable to say that he shall be exempted from the payment of costs subsequent to his admission: but it might work great injustice to the defendant, if it were held that he might be put to costs, under an expectation that he must eventually recover them, and then, by a retrospective order, be exposed to a charge which he never would have thought of incurring, if he had known the plaintiff to be a pauper.

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Rule discharged, without costs (a).

(a) See *Pitcher v. Roberts*, 2 Dowl. P. C., (N. S.), 394.

SHATWELL v. HALL, LEE, PRIESTLEY, and
BROADBENT.

Nov. 13.

TRESPASS for breaking and entering the plaintiff's dwelling-house at Staley-bridge, in the county of Chester, and taking his goods. The defendants Hall and Lee pleaded separately not guilty, and also special pleas of justification under the stat. 11 Geo. 2, c. 19, s. 7; and the other defendants, Priestley and Broadbent, pleaded not guilty by statute. At the trial before *Gurney, B.*, at the last Chester assizes, it appeared that the tenant of a cottage at Staley-bridge, of which the defendant Hall was the landlord, having absconded without payment of his rent, and it being suspected that some of his goods had been clandestinely removed to the plaintiff's house in order to avoid a distress,

A local act of Parliament, for lighting, watching, &c. the town of Staley-bridge, empowered the commissioners therein named to appoint constables and assistant constables for keeping the peace in the said town, and for executing all such warrants, &c. as the justices of Cheshire or Lancashire should direct to

them to be executed within the town. Another section enacted, that no plaintiff should recover in any action against any person for anything done in pursuance of the act, without twenty-one days' notice of action having been given:—*Held*, that a constable appointed under the act, who was sued in trespass for breaking and entering the plaintiff's house in the town of Staley-bridge, in the execution of a warrant granted by a justice of Cheshire, to search for goods alleged to have been clandestinely removed there to avoid a distress, under the 11 Geo. 2, c. 19, s. 7, was not entitled to notice of action.

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on the ground that they were constables appointed under an act of Parliament for the ancient town of Staley-bridge, and that under that act they were entitled to notice of action.

Now the action is not brought for any thing done by them directly in execution of any of the *powers* of the local act of Parliament; but it was said that it was brought against them for something which they did, and could only do, by the authority of the act. It is true they were appointed constables by virtue of the act of Parliament, which gives them all the authority of constables; but the act they did was not in pursuance of the act of Parliament at all, and they were not entitled to notice, in respect thereof, any more than any other constable would be.

We think, on a consideration of the act, that it gives them a general jurisdiction, such as any other constable would have, appointed by any other legal authority; and that it does not limit their authority as constables in the execution of their duty, within the local ambit of the act. It makes them constables in the counties of Cheshire and Lancashire, (in both of which the town of Staley-bridge is situate), and entitles them to all the privileges which a constable appointed in any other manner by the justices would have; but who, in the execution of his general duties, is not protected by any act of Parliament requiring notice to be given previous to action brought. We think, therefore, that no rule ought to be granted.

Rule refused.

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WRIGHT v. MAUDE and Others.

Nov. 2.

TRESPASS for false imprisonment against the defendants, who were commissioners of bankrupts at Leeds. The defendants pleaded not guilty by statute.

The cause was tried before Lord *Denman*, C. J., at the last Summer assizes for the county of York, when it appeared that the action was brought against the defendants for committing the plaintiff for refusing to be examined, and to produce an assignment of the bankrupt's property to trustees, which was the act of bankruptcy upon which the fiat was founded.

The deed of assignment, which was attested by the plaintiff, was in the hands of Messrs. Taylor & Co., attorneys at Wakefield, and they refused to deliver it to the plaintiff, who was their clerk. The defendants issued the following summons to the plaintiff and others, under the 6 Geo. 4, c. 16, s. 83:—"By virtue of a fiat in bankruptcy, bearing date &c., these are to will and require you, and each of you, to whom this our warrant is directed, personally to be and appear before the majority of us the said commissioners, at &c., at the hour of eleven in the forenoon of the 13th of March, and then and there to bring with you, and to produce to us, a certain indenture of assignment," &c. The plaintiff, who was not able to produce the deed, attended at the appointed place and hour, when he was informed by the

Trespass.—The defendants, who were commissioners of bankrupts at Leeds, issued their summons to the plaintiff, by which they commanded him to appear at a meeting before them at eleven o'clock on a certain day, and bring with him a certain deed of assignment. He appeared accordingly at eleven o'clock, and afterwards at one. Upon his attending on the second occasion, he saw one of the commissioners, who, on learning that he had not brought the assignment, said, "You must have known it was of no use to come without the assignment, but we will hear what you have to say by and bye." The plaintiff then went away, and

two days afterwards was taken into custody by warrant of the commissioners; which, after reciting the proceedings in bankruptcy, and the issuing and service of the summons, "and that the plaintiff did not come before them in pursuance of the summons in order to be examined touching the matter aforesaid, or produce the said assignment, he having no lawful impediment," &c., directed the constable to apprehend the plaintiff and bring him before the commissioners to be examined as aforesaid, "and to produce the said assignment:"—*Held*, first, that the issuing of the warrant was regular, the plaintiff being bound, not only to attend at the appointed hour, but to wait until he could be examined: secondly, that the warrant was not vitiated by the introduction of the words "to produce the said assignment," inasmuch as a party is compellable to do so, if commanded, under 6 Geo. 4, c. 16, s. 34.

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solicitor to the fiat that the commissioners were engaged on other business, and that he would not be required to attend till one o'clock. On his attending at that hour, he saw one of the commissioners, who, on learning that he had not brought the assignment, said, "You must have known it was of no use to come without the assignment, but we will hear what you have to say by and bye." The plaintiff then went away, and two days afterwards was taken into custody by a warrant of the commissioners. The warrant recited the proceedings in bankruptcy, the issuing and service of the summons, and then proceeded in these terms: "Whereas we, the said commissioners, having met accordingly at the time and place aforesaid, the said E. M. Wright did not come before us in pursuance of our said summons, in order to be examined touching the matter aforesaid, or produce the said assignment, he having no lawful impediment," &c. It then directed the constable to apprehend the plaintiff, and bring him before the commissioners "to be examined as aforesaid, and to produce the said assignment." Under the circumstances, it was objected by the defendants' counsel that no action would lie against the commissioners of bankruptcy for any thing done by them in their judicial capacity, and *Doswell v. Impey* (a) was cited. Lord Denman, C. J., inclined to think that no action would lie against commissioners of bankruptcy acting judicially, but he left two points to the jury; first, the amount of damages sustained, assuming a trespass to have been committed in point of law; and secondly, whether, when the commissioner told the plaintiff there was no use in his coming without the deed of assignment, he meant to sanction the plaintiff's going away. The jury found the last question in the negative, and they also found that the plaintiff sustained no damage. Upon which the learned Judge

(a) 1 B. & C. 163; 2 D. & R. 350.

nonsuited the plaintiff, giving him leave to move to enter a verdict for nominal damages.

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Knowles now moved accordingly, either to enter a verdict for the plaintiff, or for a new trial.—The learned Judge was wrong in saying that no action lies against commissioners of bankrupt, for there are many cases to shew the contrary. *Doswell v. Impey* merely decided that the commissioners are the judges who are to decide whether the answers given by the witness are satisfactory or not. The cases of *Grocock v. Cooper* (a), and *Isaac v. Impey* (b), shew clearly that such an action is maintainable. Secondly, the plaintiff has not been guilty of any disobedience, for he attended at the time and place appointed, and was told that his case was not to be taken until a subsequent hour, which was substantially a new appointment, and required a fresh summons. [*Parke, B.*—He was to come there not merely at eleven o'clock, but to be examined, and the jury have found that Mr. Maude did not mean that he should go away. The simple point here is, the plaintiff never did obey the summons. *Lord Abinger, C. B.*—He comes at the time appointed, but he does not wait to be examined.] But even supposing the plaintiff to have been guilty of a contempt in not attending to be examined, the warrant is too large, for it directs him to be taken into custody, not only for that purpose, but also until he should produce a deed, which it is clear, from the evidence, was not in his possession, and which he had no means of producing, without the consent of parties over whom he had no control. The act gave the defendants no authority to order him to produce the deed. It has been established by several cases, that where authority to interfere with the liberty of the subject is given to commissioners of bank-

(a) 8 B. & C. 211; 2 Man. & R. 78.

(b) 10 B. & C. 442.

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rupt, or other such inferior jurisdictions, the words of the act conferring the authority must be strictly pursued. *Brace's case* (a), *Yoxley's case* (b), *Rex v. Nathan* (c), *Evans v. Rees* (d). Therefore, the commissioners in this case having only been empowered to issue their warrant to bring the party before them for examination, the statement in it, that he was to produce the document over which he had no power, vitiates the whole.

LORD ABINGER, C. B.—I am of opinion that there is no ground for a rule in this case. The 33rd section of the statute clearly authorizes the commissioners to summon the party to attend and produce such documents as they deem requisite; and if he does not attend, then to issue a warrant to bring him before them to be examined *as aforesaid*, namely, to the effect specified in the summons. Now, in the present case, the summons requires him to appear to be examined in a certain way, namely, with a certain document. With respect to the other point, I do not think that the plaintiff obeyed the summons by merely attending at the appointed time. Bankrupt commissioners frequently have several commissions to go through with, which they ought to take in order; and a witness summoned to attend one commission, who comes and finds the commissioners engaged upon another, has no right to make that circumstance an excuse for going away without being examined.

PARKE, B.—I am entirely of the same opinion. The first question is, did the plaintiff obey the exigency of the summons? It is clear he did not. The summons required him to come before the commissioners at a certain place to

(a) 1 Salk. 346.

(b) Id. 351.

(c) 2 Str. 880.

(d) 12 Adol. & Ell. 55; 4 P. & D. 32.

be examined, and it was his duty not only to go to that place, but to wait there until examined, or until his attendance for that purpose was dispensed with. It might as well be contended that a witness subpoenaed to attend a trial at Nisi Prius did all that was required of him by appearing at the sitting of the Court in the morning, and then immediately going away. It is said, however, that the plaintiff was released from further attendance by one of the commissioners; but on that point the jury have found the fact against him. Then comes the question, whether the commissioners have exceeded their authority by issuing their warrant to compel the plaintiff's attendance, both to be examined and also to produce this document; and I think they have not. The question turns on the construction of the 83rd section of 6 Geo. 4, c. 16, which enacts, "that it shall be lawful for the commissioners, by writing under their hands, to summon before them any person whom they believe capable of giving material information relative to bankruptcy; and to require such person to produce any books, papers, &c. which appear to the commissioners necessary to the verification of the deposition of such person, or to the full disclosure of any of the matters which the commissioners are authorized to inquire into; and if such person so summoned as aforesaid shall not come before the commissioners at the time appointed, it shall be lawful for the said commissioners, by warrant under their hands and seals, to authorize and direct the persons therein named for that purpose, to apprehend and arrest such person, and bring him before them to be examined as aforesaid." Now, what do these words "as aforesaid" mean? Look at what goes before; the commissioners are to have the power to examine any person who can give information concerning the property or acts of the bankrupts, and, as ancillary to that, any person who can produce any deeds in his custody or possession that may appear

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essential for that purpose. If the person summoned altogether refuses to come, they may issue a warrant to compel him to appear with the documents; but if he comes with and refuses to produce them, they may commit him under the provisions of the 34th section. Here, then, the commissioners have issued a summons, directing the party to attend before them to be examined, and to bring with him a document which will furnish them with the means of examining him with effect. If he disobeys that summons, they have no alternative but to issue a warrant for his apprehension, in the words of the act, for the purpose of his being brought before them to be examined "as aforesaid." Besides which, it is only reason that the warrant should be ad idem with the summons; if the latter requires him to produce the document, so should the former. Were this otherwise, and the warrant were silent about the document, the party, when brought before the commissioners, might say, "I never received the summons which is alleged to contain mention of the deed of assignment, and as I saw no mention of it in the warrant, I did not bring it with me."

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

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THIS was an action of assumpsit, brought by the plaintiff as the vendor against the defendant as the purchaser of the advowson of Wyverstone, in the county of Suffolk, for the non-completion by the defendant of his purchase. The following case was stated by the parties for the opinion of this Court:—

John Moseley, being seised in fee simple of the manor of Wyverstone, and also of the advowson of the rectory of Wyverstone, which was appendant to the manor, and not an advowson in gross, by his will dated the 8th of August, 1773, duly executed and attested, after devising certain estates to his nephew William Moseley for life, with remainder to his eldest son (who was then living) for life, with remainder to the first and other sons of the body of such eldest son in tail male, devised to his nephew Richard Moseley for life his manor or lordship of Wyverstone, and the several farms and lands thereto belonging, (subject to an annuity created by his will), with their and every of their rights and appurtenances, and also another estate in Berkshire, with remainder to the first and other sons of his body in tail male, with remainder to the said William Moseley for life, with remainder to the eldest son of the said William Moseley for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of the body of such eldest son successively in tail male, with remainder to the second and every

A deed to lead the uses of a recovery by mistake treated an advowson as being in gross, when in fact it was appendant to a manor; and recited, that A., being seised of the manor and advowson, devised the manor and other estates, *not including the advowson*, to B., for life, with remainders for life and in tail, and devised the residue of his real estate to B. and C. in fee, as tenants in common; and that B., being seised in fee of a moiety of the advowson *so devised to him as aforesaid*, made his will, and devised his real estate to his widow for life, with remainder to M. for life, with remainder to his issue in tail: and the deed then pro-

ceeded to convey the manor with its appurtenances, and also (inter alia) *the moiety, formerly of the said B., of and in the advowson*, to a trustee for the purpose of making a tenant to the precept to suffer a recovery, to enure to the use of M. for life, with remainder to his eldest son in fee. In fact, the will of A. contained a sufficient devise of the manor and the appendant advowson to B. for life, with remainders for life and in tail, and under this devise M. was in fact, at the date of the deed, tenant for life of the manor and advowson, with remainder to his eldest son in tail: and M., and his eldest son, were parties to the deed:—*Held*, that, although the premises in the recovery deed were in themselves large enough to have passed the whole advowson as appendant to the manor, yet that, by reason of the intention of the parties apparent on the face of the deed (although arising out of a mistake as to their title), the estate tail was not barred in one moiety of the advowson.

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other son of the body of the said William Moseley successively in tail male, with remainder to the testator's right heirs. The testator also devised all the residue of his real estates to his said two nephews and their heirs, as tenants in common.

The testator died in 1775, leaving his two nephews him surviving, and also John Moseley the plaintiff, the eldest son of William Moseley, being the person in the will described as such.

In 1785 William Moseley died intestate, leaving the plaintiff his heir-at-law.

Richard Moseley, by his will dated the 20th of November, 1800, devised all his estates to Sarah his wife for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of the body of the plaintiff in tail general. Richard Moseley died in 1803, without issue, leaving his widow him surviving. The plaintiff had issue John Galway Moseley, his eldest son, who attained his age of twenty-one years on the 14th of February, 1820.

The advowson continuing appendant to the manor, by indentures of lease and release, dated the 11th and 12th of February, 1823, the release being made between the plaintiff of the first part, the said John Galway Moseley of the second part, the said Sarah Moseley of the third part, T. Dixon of the fourth part, and T. Holmes of the fifth part: after reciting that John Moseley the testator, being seised of certain estates and of the manor of Wyverstone in Suffolk, and also of the advowson of Wyverstone, and other hereditaments, devised certain estates to the said William Moseley as before mentioned, and the said manor and other hereditaments situate in Suffolk and in Berkshire, charged with the payment of certain annuities therein mentioned (*and not including the said advowson*), to the said Richard Moseley for life, with remainder to his first and other sons in tail male, with remainder to the said

William Moseley for life, with remainder to his first and other sons in tail male; and that the said testator devised the residue of his real estate to his said two nephews and their heirs, as tenants in common: and after reciting that the said Richard Moseley, *being seised in fee simple of* (amongst other things) *the moiety of the said advowson so devised to him as aforesaid*, made his will, and thereby, after making certain devises which did not include the said moiety of the said advowson, devised the residue of his freehold estates to the said Sarah Moseley for life, with remainder to the said John Moseley for life, with remainder to his first and other sons in tail general; and that the said Richard Moseley died without issue, and that the plaintiff had issue the said John Galway Moseley, his eldest son and heir, who had attained his age of twenty-one years; and that, by virtue of the said wills, the said John Galway Moseley was seised of the hereditaments devised by the said wills, for an estate in tail or in tail male in remainder expectant on the decease of the plaintiff, and so far as related to the hereditaments devised by the will of the said Richard Moseley, also expectant on the decease of the said Sarah Moseley: and reciting, that the plaintiff and John Galway Moseley were desirous of barring the said estates in tail and in tail male, *and all other estates in tail or tail male then subsisting in the premises or any part thereof*, and of settling the said premises as thereafter mentioned; and that the said Sarah Moseley had agreed to concur with them in manner therein mentioned: it was witnessed, that for effectuating the purposes aforesaid, the plaintiff and John Galway Moseley released, and the said Sarah Moseley, so far as related to such of the said hereditaments as were so devised to her by the said Richard Moseley for her life, released unto the said T. Dixon and his heirs (inter alia) all that the manor or lordship of Wyverstone, and all demesne lands, rights, members, and appurtenances whatsoever to the said manor or lordship

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belonging or in anywise appertaining, or accepted, reputed, taken, or known as part, parcel, or member thereof, lying and being in the county of Suffolk, which said manor and hereditaments made up and constituted the manor and hereditaments so in the first instance devised by the said John Moseley deceased to the said Richard Moseley for his life, and all and every other messuages, lands, tenements, hereditaments, and all and singular other the premises, late of the said John Moseley deceased, in the said several counties of Suffolk and Berks, and so devised by him to the said Richard Moseley deceased, for his life as aforesaid: and also *all that the moiety or half-part, formerly of the said Richard Moseley deceased*, of and in the advowson of the parish church and rectory of Wyverstone aforesaid, with the right of presentation and other appurtenances thereto belonging, *and which said moiety became vested in him in fee by the said will of the said testator John Moseley*, as thereinbefore mentioned, *as tenant in common with the said William Moseley deceased*, and which said moiety of the said advowson was so devised by the said Richard Moseley deceased by his said will as aforesaid, together with all commodities, privileges, hereditaments, and appurtenances whatsoever to the said manor, messuages, lands, tenements, moiety of advowson, and hereditaments, belonging or appertaining, or accepted, reputed, taken, or known as part, parcel, or member thereof; and all the estate, right, and title of the plaintiff, John Galway Moseley, and Sarah Moseley, of, in, and to the said manor, messuages, lands, tenements, moiety of advowson, hereditaments, and premises thereby granted and released, or intended so to be, and every of them, and every part thereof: to hold the said manor, messuages, lands, tenements, moiety of advowson, and hereditaments, with their appurtenances, unto and to the use of the said T. Dixon and his heirs, for the purpose of making a tenant to the præcipe, for suffering a recovery; which recovery, it was thereby declared, should enure as to the hereditaments (inter alia) thereinbefore

mentioned to have been devised by the said Richard Moseley to the said Sarah Moseley for her life as aforesaid, to the use of the said Sarah Moseley for her life; and as to all the residue of the said hereditaments, and also as to the said hereditaments so thereby limited to the use of the said Sarah Moseley for her life as aforesaid, subject to her life interest therein, to the use of the plaintiff for life, with remainder to the use of the said John Galway Moseley and his heirs for ever.

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In Easter Term, 4 Geo. 4, a recovery with double voucher was suffered in pursuance of this indenture, wherein the said T. Holmes was demandant, the said T. Dixon tenant, the plaintiff first vouchee, and the said John Galway Moseley second vouchee, of (inter alia) "the manor of Wyverstone, with the appurtenances, in the county of Suffolk, and divers messuages and lands, with the appurtenances, in Wyverstone, and the advowson of the church of Wyverstone."

The said Sarah Moseley is dead. The said John Galway Moseley had died intestate, but the vendor, the plaintiff, was able and willing to procure a conveyance of the said advowson from his heir-at-law.

The question for the opinion of the Court is, whether the entail created by the will of the said John Moseley, deceased, still subsists in the said advowson of Wyverstone, or any part thereof.

The case was argued in last Trinity Term (June 8 and 10) by

Taprell, for the plaintiff.—It appears from the statement in the case, that the recovery was in fact suffered of the entire advowson; but as the operation of the recovery cannot be more extensive than that of the deed to lead the uses, which created the tenant to the præcipe, it is conceded that the question turns upon the construction of the deed only; and it is submitted that, under the cir-

Exch. of Pleas, cumstances, it operated to convey the entirety of the advowson. Being in fact an advowson *appendant* to the manor, it would pass by the devise of "the manor, and the several farms and lands thereto belonging, with their and every of their appurtenances," in the will of John Moseley, and was not included in the residuary devise. It is a well established rule, that by the grant of a manor *eo nomine*, all things which are appendant to the manor will pass therewith, without express words. Perkins on the Laws of England, s. 116; 2 Rol. Abr. 60, Grant, (A.); Com. Dig., Grant, (E. 9); Co. Litt. 307. a.; Hargrave's note to Co. Litt. 121. b. The advowson therefore became subject to the entail created by the will of John Moseley, and was unaffected by the will of Richard Moseley, who was tenant for life only; and on his death without issue, it devolved on the plaintiff for life (on whom the other estates had previously devolved), and he was also the first tenant in tail in remainder. But from the language of the deed of 1823, it is manifest that the parties did not then know the true state of their title, and they treated the advowson as having been an advowson *in gross* at the date of John Moseley's will, and as having passed by the residuary devise therein to his two nephews, as tenants in common: supposing, therefore, that the plaintiff had succeeded, on his father's death, to a moiety only, and that the other moiety had passed under the will of Richard Moseley to his widow for life, with remainder to the plaintiff for life, and to his issue in tail. Under these circumstances, the question is, what was the legal operation of the recovery upon the entail then subsisting in the advowson. The doctrine of *estoppel* is not applicable to this case, because, although the parties to the deed themselves might be bound by its mis-recitals, no issue could be. Com. Dig., Estoppel, (C.); 1 Preston on Conveyancing, 5. The Court will, therefore, reject the erroneous recitals, and construe the deed by reference to the then really existing state of the title,

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and not with reference to the circumstances mis-recited; and the deed being so construed, its words will then be sufficient to pass the entire interest in the advowson. There are many authorities to warrant such a construction. Bac. Abr., Grants, (H.); Com. Dig., Fait, (E. 4); Co. Litt. 46.b., and Hargrave's note (10) thereon; *Gough v. Howarde* (a), *Miller v. Manwaring* (b), *Bishop of Bath's case* (c), *Mount v. Hodgkin* (d), *Smith v. Touchet* (e). [Rolfe, B.—A party may by his deed separate an advowson from a manor; but if he conveys the manor, does not the advowson necessarily pass, unless he indicates his intention to separate them? And can it be said that the recitals of this deed do indicate such an intention?] The false description may be rejected, and enough will remain to shew an intention to bar all existing estates tail in the advowson. That the *premises* are sufficiently large to pass the entire advowson, the following authorities are sufficient to establish: 2 Roll. Abr. 57, Grant, (I.); Com. Dig., Parols, (A. 19, 23); Shep. Touch. 91, 247; *Stukeley v. Butler* (f), *Trenchard v. Hoskins* (g), *Earl of Clanrickard's case* (h), *Doe d. Milburn v. Salkeld* (i), *Freeman v. Duke of Chandos* (k), *Ringer v. Cann* (l). The parties had a general intention to convey every thing that was subject to the entail, although, from their mistake as to their title, they might have a particular intention, which could not be carried into effect, to pass that which never existed. The Court will apply the same principle of construction as in the case of a will, in order to carry out the general intention. It is analogous to the cases in which it has been held, that a deed, if it cannot legally operate in one way, may be made to operate

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(a) 3 Bulstr. 125.

(b) Cro. Car. 399.

(c) 6 Rep. 36.

(d) Dyer, 116, pl. 70.

(e) Cited Skin. 540.

(f) Hob. 170.

(g) Winch, 91.

(h) Hob. 277.

(i) Willes, 673.

(k) Cowp. 363.

(l) 3 M. & W. 343.

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in another, in order that the intention of the parties may not fail altogether; as in *Roe v. Tramarr* (a). The principle of this rule of construction is stated in *Shep. Touch.* 82, that "a deed intended and made to one purpose, may enure to another, for if it will not take effect that way it is intended, it may take effect another way."

But, at all events, the one moiety of the advowson, though expressly granted, would continue appendant, and the other moiety would pass as parcel of the manor, not being expressly excepted: *Com. Dig., Advowson, (B.)* It could not be excepted by implication, except in a grant from the Crown, or by virtue of the stat. 17 Edw. 2, c. 15; *Com. Dig., Fait, (E. 5.)* None of the requisites to a good exception occur in this case.

Rickards, for the defendant.—The deed to make a tenant to the præcipe could not operate to pass the entire advowson, and the entail still subsists in one moiety. The ordinary rules of law for the interpretation of instruments under seal must apply to this as to other cases. The plaintiff contends, that the deed passed the entire advowson, in several moieties; the one under the express grant of the moiety, the other by implication, under the conveyance of the manor to which the advowson is appendant. Now, as to the first, conceding that a mere mis-recital of an immaterial fact will not prejudice the operation of the deed, and may be rejected by the Court in construing it, the question here is, whether the allegations which it is sought to reject are not rather a part of the essential description of the property intended to be conveyed; if so, the erroneous recitals render the deed inoperative as to the property so misdescribed: *Com. Dig., Fait, (E. 4.)*; *Shep. Touch.* 99. Assuming, however, that the deed took effect as to the moiety expressly mentioned in it, the argument cannot be sustained, looking at the whole of the deed, that the other

(a) *Willes*, 682; 2 *Wils.* 75.

moiety passed merely by force of the word "manor." It is true that, as a general rule, under the conveyance of a manor eo nomine, things appendant to it will also pass; but that rule is subject to this qualification, that no express exception, or specific disposition, of the things appendant be found in the same deed. The presumption, that the appendant advowson is intended to pass with the manor, can arise only in case the instrument be silent as to the former: *expressum facit cessare tacitum*. The rule is laid down in *Shep. Touch.* 89, that "that which is generally spoken is to be generally understood, unless qualified by some special subsequent words, as it well may be." The expressed intention of the parties, therefore, to deal with the advowson otherwise, prevented it from passing as appendant to the manor. Besides, if that general word is to be construed as including the advowson, it must include the entirety, not the moiety; and then a repugnancy would be created by the subsequent words, by which a moiety would purport to be expressly granted, after the entirety had already passed. With regard to the argument derived from *intention*, the Court can look only at the intention indicated on the face of the deed; and that is altogether in favour of the defendant. The intention of the parties was necessarily founded on and consistent with their belief that a moiety of the advowson only was subject to the entail; and it is impossible to suppose that they intended to bar the entail in the whole, when they were ignorant that it existed except in the undivided parts. The inference drawn on the other side from the general recital of an intention to bar all estates tail subsisting "in the premises or any part thereof," rests entirely on the force and meaning of the word "premises;" but the antecedent to that word, as respects the advowson, is clearly the *moiety* of which it is before recited that Richard Moseley was seised at the date of his will. The analogy of the rules applied to the interpretation of wills, as to the

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Exch. of Pleas, conflict between a particular and a general intention, does not hold with respect to deeds; a much greater laxity of construction is permitted in respect to testamentary instruments. Neither does the principle which was affirmed in *Roe v. Tramarr* apply to the present case. The Court will undoubtedly give effect to the intentions of parties by substituting a different form of conveyance of *the same estate*, for that which the deed was intended to create; but they have never sanctioned such a laxity of interpretation, as that a deed made to pass *one* estate should enure to convey *another*. This distinction is clearly pointed out in *Chester v. Willan* (a). Here the *entirety* and the *moiety* of the advowson are two different estates, and a deed which purports to be a specific conveyance of the one cannot by construction be made to operate upon the other. The deed expressly defines the manor as *not* including the advowson, and expressly states the entail as subsisting in the moiety only. To this deed the plaintiff is a party, and he cannot therefore be admitted to allege the contrary of that which he has thus solemnly affirmed under his seal. A party to a mis-recital in an instrument under seal is not allowed to aver that the fact recited was not true: *Lainson v. Tremere* (b). Other cases illustrating the same doctrine are cited in Smith's Leading Cases, Vol. 2, p. 456.

Taprell, in reply.—Even if the parties to the deed be bound by its erroneous recitals, none of the issue of the settlor (other than John Galway Moseley) would be affected by them. The rule of law is stated in Preston's Conveyancing, vol. 1, p. 5, that although tenants in tail may bind themselves by estoppel, as well as the owners of other estates, yet that recoveries do not operate by estoppel against the issue, or those in reversion or remainder. The argument for the plaintiff may therefore be thus recapitu-

(a) 2 Saund. 97.

(b) 1 Ad. & E. 792; 3 Nev. & M. 603.

lated. First, that part of the deed which makes mention of a specific moiety of the advowson as having vested in Richard Moseley, and passed by his will, ought to be deemed inoperative, for the misdescription of facts contained therein. Secondly, notwithstanding such misrecital, a general intention appears on the face of the deed, to pass all the property of every kind which was originally made subject to the entail, and the words of conveyance are amply sufficient to carry that intention into effect. Thirdly, as neither the entire advowson, nor either moiety of it, had in fact been severed from the manor, if a distinct moiety passed by the specific grant contained in the deed, it yet passed as appendant to the manor, and the other moiety, not being expressly excepted, passed also as parcel of the manor to which it continued appendant.

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Cur. adv. vult.

The judgment of the Court was now delivered by

ROLFE, B.—In this case the question was, whether the entail created in the advowson of Wyverstone, in the settlement by will of John Moseley, great uncle of the plaintiff, is, as to the whole or any part of the advowson, still subsisting. The material facts were as follow: [His Lordship stated the facts of the case antecedent to the deeds of 1823]. It seems the parties were not fully aware of the nature of their respective rights; the advowson was not specifically mentioned in the will of John Moseley, the testator, and the plaintiff and his son, not, as it should seem, being aware that the advowson was appendant to the manor, erroneously supposed that it passed, not as parcel of or appendant to the manor, to the plaintiff for life, with remainder to his eldest son, but under the general devise of his undisposed of real estates, to his nephews as tenants in common. The plaintiff and his son, therefore, mistakenly

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supposed that, as to one moiety of the advowson, the plaintiff had, on the death of his father, become seised in fee simple as his heir-at-law, and as to the other moiety, he had, under the will of his uncle Richard, become entitled, subject to the life interest in Sarah, the widow of Richard, as tenant for life, with remainder to his son John Galway Moseley, in tail. Such being the state of the title, the plaintiff and his eldest son proceeded, in Hilary Term 1823, to suffer a recovery of, amongst other things, the property devised to them under the wills of John Moseley and Richard Moseley: and whether those recoveries did effectually comprise the advowson in question, is the point we have to decide; if it did, judgment is to be entered for the plaintiff; if it did not, it is agreed that judgment of nonsuit shall be entered.

The recovery itself mentioned both the manor and the advowson by name, and all necessary parties were duly vouched; so that the only point is, whether the advowson passed under the deed creating the tenant to the præcipe in question. On the part of the plaintiff, it was argued that the advowson passed either under the designation of the manor, as being appendant thereto, or if not so, that it passed by express words, being named in the description of the parcels actually mentioned. In support of the first proposition, that the advowson passed by the conveyance of the manor, we were referred to a variety of old authorities, to shew that an advowson, appendant to a manor, is so entirely and intimately connected with it, as to pass by the grant of the manor, without being expressly mentioned or referred to. And we have no sort of doubt, that if a tenant in tail of a manor, with an advowson appendant, suffer a recovery, it is not necessary for him to make any express mention of his intention to include the advowson in the recovery: any dealing with the manor, which is the principal, operates on the advowson, which is the accessory, whether expressly named or not: but it is to be observed, although the conveyance of the manor *primâ facie* draws

after it the advowson also, yet it is always competent for the owner to sever the advowson from the manor, either by conveying the advowson away from the manor, or by conveying the manor without the advowson: and the question is, whether, by the mere grant of the manor in the deed making the tenant to the præcipe in this case, the parties have not clearly shewn that they meant the manor without the advowson. If they have, it would be impossible to contend that the law would force on parties a meaning of the word "manor" more extensive than they on the face of the deed themselves intended it to bear. We think that in this case there is evidence enough to shew that the parties, by the word "manor," meant the manor without the advowson. The deed begins by reciting, that the testator was seised of the manor, *and also of the advowson*; it then goes on to recite the devise of the manor, *not including the advowson*; it then recites, that Richard, being seised in fee of *a moiety of the advowson*, devised it; then there is a conveyance of the manor, and *a moiety of the advowson*. It being a mere question of intention, in what sense the parties intended to use the word "manor," whether as including or excluding the advowson, we think it clear, from the passages pointed out, that they must have meant to exclude it, and consequently the deed must be read as if it was so stated on the face of it; and the consequence is, that the advowson did not pass merely by the force of the word "manor."

The only remaining question is, whether there are any other words among the parcels specified in the deed which would carry the advowson. We think there are not. One moiety of the advowson passes by the express language used; the other is not conveyed in terms; there are no general words that can be fairly said to include it, for the words are "all and singular other the premises late of the said John Moseley deceased, so devised by him to the said Richard Moseley for his life, as aforesaid;" that is, refer-

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ring to the previous recitals of the devise, "manor, lands, and hereditaments, *not including the advowson.*" We think it would be a straining of the general words beyond their legitimate meaning, to put upon them a sense which the parties have expressly said they did not mean to apply.

The result is, that there must be judgment of nonsuit.

Judgment of nonsuit accordingly.

Nov. 4.

DAVIES v. MANN.

The general rule of law respecting negligence is, that although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover. Therefore, where the defendant negligently drove his horses and waggon against and killed an ass, which had been left in the highway fettered in the forefeet, and thus unable to get out of the way of the defendant's waggon, which was going at a

CASE for negligence. The declaration stated, that the plaintiff theretofore, and at the time of the committing of the grievance thereafter mentioned, to wit, on &c., was lawfully possessed of a certain donkey, which said donkey of the plaintiff was then lawfully in a certain highway, and the defendant was then possessed of a certain waggon and certain horses drawing the same, which said waggon and horses of the defendant were then under the care, government, and direction of a certain then servant of the defendant, in and along the said highway; nevertheless the defendant, by his said servant, so carelessly, negligently, unskilfully, and improperly governed and directed his said waggon and horses, that by and through the carelessness, negligence, unskilfulness, and improper conduct of the defendant, by his said servant, the said waggon and horses of the defendant then ran and struck with great violence against the said donkey of the plaintiff, and thereby then wounded, crushed, and killed the same, &c.

The defendant pleaded not guilty.

At the trial, before *Erskine, J.*, at the last Summer As-

smartish pace along the road, it was held, that the jury were properly directed, that although it was an illegal act on the part of the plaintiff so to put the animal on the highway, the plaintiff was entitled to recover.

sizes for the county of Worcester, it appeared that the plaintiff, having fettered the fore feet of an ass belonging to him, turned it into a public highway, and at the time in question the ass was grazing on the off side of a road about eight yards wide, when the defendant's waggon, with a team of three horses, coming down a slight descent, at what the witness termed a smartish pace, ran against the ass, knocked it down, and the wheels passing over it, it died soon after. The ass was fettered at the time, and it was proved that the driver of the waggon was some little distance behind the horses. The learned Judge told the jury, that though the act of the plaintiff, in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages travelling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the waggon, the action was maintainable against the defendant; and his Lordship directed them, if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff. The jury found their verdict for the plaintiff, damages 40s.

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Godson now moved for a new trial, on the ground of misdirection.—The act of the plaintiff in turning the donkey into the public highway was an illegal one, and, as the injury arose principally from that act, the plaintiff was not entitled to compensation for that injury which, but for his own unlawful act, would never have occurred. [*Parke, B.*—The declaration states that the ass was lawfully on the highway, and the defendant has not traversed that allegation; therefore it must be taken to be admitted.] The principle of law, as deducible from the cases, is, that where an accident is the result of faults on both sides, neither party can maintain an action. Thus, in *Butterfield v. Forrester*(a),

(a) 11 East, 60.

Exch. of Pleas, it was held that one who is injured by an obstruction on a highway, against which he fell, cannot maintain an action, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction. So, in *Vennall v. Garner* (a), in case for running down a ship, it was held, that neither party can recover when both are in the wrong; and *Bayley, B.*, there says, "I quite agree that if the mischief be the result of the combined negligence of the two, they must both remain in statu quo, and neither party can recover against the other." Here the plaintiff, by fettering the donkey, had prevented him from removing himself out of the way of accident; had his fore feet been free, no accident would probably have happened. *Pluckwell v. Wilson* (b), *Luxford v. Large* (c), and *Lynch v. Nurdin* (d), are to the same effect.

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LORD ABINGER, C. B.—I am of opinion that there ought to be no rule in this case. The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there; but even were it otherwise, it would have made no difference, for as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there.

PARKE, B.—This subject was fully considered by this Court in the case of *Bridge v. The Grand Junction Railway Company* (e), where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by

(a) 1 C. & M. 21.

(b) 5 Carr. & P. 375.

(c) Ibid. 421.

(d) 1 Ad. & E. (N. S.), 29;

4 P. & D. 672.

(e) 3 M. & W. 246.

ordinary care, have avoided the consequences of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that "the rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*, that, although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong." In that case of *Bridge v. Grand Junction Railway Company*, there was a plea imputing negligence on both sides; here it is otherwise; and the Judge simply told the jury, that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.

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GURNEY, B., and ROLFE, B., concurred.

Rule refused.

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Nov. 22.

Where a cause, in which there are several issues, is referred to an arbitrator, and the costs of the cause are to abide the event of the award, the arbitrator must award specifically on each issue, and a general award, that the plaintiff had good cause of action against the defendant, and that the defendant should pay to the plaintiff a certain sum, together with the costs of the action and of the reference, is bad.

BOURKE v. LLOYD.

DEBT for money lent, money paid, interest, and on an account dated. Pleas, *nunquam indebitatus*, and payment, on which issues were joined. The cause was referred, before trial, to an arbitrator, by a judge's order, which directed that the costs of the cause should abide the event of the award, and that the costs of the reference should be in the discretion of the arbitrator. The arbitrator awarded, that the plaintiff had good cause of action against the defendant, and directed that the defendant should pay to the plaintiff £20, together with the costs of the action and of the reference: but he did not award specifically on each issue.

A rule having been obtained for setting aside this award, on the ground that the arbitrator had not determined the issues in the action, so as to enable the Master to tax the costs,

Cowling, in last Easter Term, (May 3), shewed cause.—This not being a case in which any verdict had been given, it was not strictly necessary for the arbitrator to find specifically on the issues. But if it was, his directing the defendant to pay the plaintiff £20, after having stated that the plaintiff had good cause of action, amounts in effect to a finding for the plaintiff on all the issues, and makes the award sufficiently certain. In *Dicas v. Jay* (a), where the declaration contained eleven special counts for negligence as an attorney, together with common counts for money paid, &c., and the cause was referred by order of *Nisi Prius* to an arbitrator, who found that the plaintiff had good cause of action for 23*l.* 14*s.* 10*d.*, and directed a verdict to be entered up for that sum, the award was held sufficiently

(a) 5 Bing. 281; 2 M. & P. 448.

certain. In *Duckworth v. Harrison* (a), where, to a declaration in debt, the general issue and a set-off were pleaded, and the cause was referred by consent to arbitration, "the costs of the reference and award to abide the event;" and the arbitrators found that the plaintiff was not entitled to recover in the action, and had not any cause of action against the defendant, but said nothing as to the set-off; it was nevertheless held that the award was final, and that the defendant might maintain an action for the costs of the reference and award. In the present case, there could have been no intention that the arbitrator should find specifically on each issue, and there will be no difficulty in taxing the costs, the finding amounting to a general verdict for the plaintiff.

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Ramsday, contra.—The arbitrator was bound, under this order of reference, to find specifically on all the issues, since otherwise there would be no legal *event* of the cause, to enable the plaintiff, under the new rules, to obtain his costs. In *Norris v. Daniel* (b), where the arbitrator had not awarded on three of the counts of the declaration, the award was set aside, on the ground that there was no legal event to authorize the taxation of costs. So, in *Doe d. Madkins v. Horner* (c), where the costs of an ejectment were to abide the event of an award, the award was held bad for not stating on which demise the plaintiff was entitled to succeed. So also, in *Gisborne v. Hart* (d), where the costs of the action (which was assumpsit on a promissory note, with a count upon an account stated) were to abide the event of the award, and the arbitrator awarded only that the plaintiff had good cause of action for and was legally entitled to recover of the defendant 22l. 11s. 9d., being the amount of the promissory note mentioned in the

(a) 4 M. & W. 432.

(c) 8 Ad. & E. 235; 3 N. & P.

(b) 10 Bing. 507; 4 M. & Scott, 344.

383.

(d) 5 M. & W. 50.

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pleadings, the award was held bad, because it did not also dispose of the account stated. But *England v. Davison* (a) is expressly in point. There the cause, in which there were several issues, was referred to arbitration, the costs of the action, the reference, and the award, to abide the event. The arbitrator was not desired to find specifically on each issue; and he awarded generally that the plaintiff had no cause of action against the defendant, and directed a verdict to be entered for the defendant. It was held by *Coleridge, J.*, after time taken to consider, that the award was bad. *Duckworth v. Harrison* was cited in that case, and distinguished on the ground that the costs of the action were not made to abide the event of the award.—He referred also to *Dibben v. Marquis of Anglesea* (b) and *Hunt v. Hunt* (c).

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B.—This was a rule obtained and argued in Easter Term, to set aside an award, and the Court took time to consider, in consequence of a suggestion at the bar that a case in this Court was at variance with, and had thrown a doubt upon, the propriety of several decisions in which it had been laid down, that where a cause with several issues was referred, the costs of the cause to abide the event, the arbitrator must award specifically on each issue. The case referred to was that of *Duckworth v. Harrison*; and from the observations said to have been made on that case by Mr. Justice *Coleridge*, in *England v. Davison*, it would seem that the learned Judge supposed that I had pronounced an opinion favourable to the decision in *Dibben v. Marquis of Anglesea*, and indeed sustained that decision. This, however, is a misapprehen-

(a) 9 Dowl. P. C. 1052.

(b) 2 C. & M. 722.

(c) 5 Dowl. P. C. 442.

sion of what I said. In the case of *Duckworth v. Harrison*, the costs of the *reference and award*, not of the *action*, were to abide the event; and the Court, after some hesitation, held that the meaning of the parties was, that all the costs of the reference and award should abide the event of the award; so that, if the plaintiff succeeded, he should have all those costs, and the defendant, on the other hand, if he succeeded, should have all; and I stated, or certainly meant to state, that if the parties had intended that the costs of the reference and award should be divided, and apportioned to each issue, they should have provided for it in the submission. It is a mistake, therefore, to suppose that the Court intended to confirm the case of *Dibben v. Marquis of Anglesea*. We must follow the current of decisions on this subject, by which it is established that if the cause is referred, where several issues are joined, and the costs of the cause are to abide the event, the arbitrator must decide each issue.

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Rule absolute.

HURCUM v. STERICKER and ANOTHER.

Nov. 23.

ASSUMPSIT. The first count of the declaration stated, that the plaintiff was employed by the defendants as a carman at the wages of £160 per annum; that it was the

The first count of a declaration in assumpsit alleged that the plaintiff was employed by

the defendants as a carman, at wages after the rate of 160*l.* a year, and claimed damages for his discharge without just cause during the year; there was also a count for work and labour. The particulars of demand stated, that the plaintiff, besides seeking to recover damages under the special count, also sought to recover, under the indebitatus count, 37*l.*, the balance of account for a quarter's work done by him for the defendants, commencing on the 30th June, and ending on the 30th September, 1842, after giving credit for 3*l.* paid on account thereof. It appeared in evidence that the plaintiff was discharged on the 30th July, 1842, for misconduct, which the jury found to be a sufficient cause for his dismissal; that he worked out that day, and that on the next morning the defendant sent for him, and he remained working there that day also, and then left. The jury found that the value of those two days' work was 40*s.*, but that he was entitled to a month's wages, and he accordingly had a verdict for 10*l.* 6*s.* 8*d.*, allowing for the 3*l.*, which had been paid in advance:—*Held*, that the plaintiff was not precluded by his particulars from recovering this sum.

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duty of the defendants not to discharge the plaintiff without just cause; but that they did discharge him without just cause during the year. There were also counts for work and labour, and on an account stated. The particulars of demand were as follows:—"The plaintiff, besides seeking to recover damages under the special count of the declaration, also seeks to recover, under the indebitatus count of the declaration, the sum of £37, being the balance of account for one quarter's cartage work done by him for the defendants, commencing on the 30th of June and ending on the 30th of September 1842, after giving the defendants credit for the sum of £3 paid on account thereof." The defendants pleaded, first, *non assumpsit*; and secondly, that the plaintiff was discharged for just cause, that is to say, for misconduct, &c.; on which issues were joined.

At the trial before *Alderson, B.*, at the London sittings in this term, it appeared that the plaintiff had made an agreement with the defendants, who were teamen in the city, to work for them as a carman, at the yearly salary of £160, payable quarterly, commencing on the 30th June, 1841. The plaintiff was discharged for alleged misconduct on the 30th July, 1842. He however worked out the whole of the day on which he was discharged; and on the following morning, the defendants' warehouseman sent for him, and asked why he did not come to his work, and he remained and worked out that day also, and then left. The jury found that the value of these two days' work was 40s. The learned Judge left it to the jury to say, whether the plaintiff was discharged for just cause, and if so, whether it was on the terms that he should be paid for the time he actually served. The jury found both points in the affirmative; and that the plaintiff was entitled to a month's wages. A verdict was accordingly taken for the plaintiff on the count for work and labour, damages 10*l.* 6*s.* 8*d.*, (allowing for the £3 which had been paid in advance). It

was contended for the defendants, that the plaintiff was restricted by his bill of particulars from claiming or recovering a *month's* wages. The learned Judge reserved the point, and gave the defendants leave to move to reduce the damages to 40*s.*, or to enter a nonsuit.

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Hill now moved accordingly.—There is no count of this declaration upon which the plaintiff could recover a month's wages, the jury having found that he was discharged for lawful cause. That finding precludes him from recovering for the wages of any part of the antecedent period; his right, therefore, to all wages up to the 30th of July, under the original contract, is at an end. Then he does two days' work subsequently to his discharge. Now, it is possible that such a contract might be entered into as was suggested at the trial, that he should be paid for the time he actually served after notice of his discharge; but there is no count of this declaration on which such a contract can be founded, comparing it with the particulars. They are for a quarter's wages, and the rate is given—at £160 per annum; the plaintiff could only recover, at most, for the two days' work according to that rate of payment, whereas here he is recovering no less than 1*l.* 6*s.* 8*d.* for those two days' service. The only new consideration is the two days' work; how can the plaintiff upon that consideration recover a month's wages? [*Alderson*, B.—The plaintiff is not tied up so tightly by his particulars to the original contract. It is clear the indebitatus count applies only to the work actually done for each and every day: the defendants could not therefore be misled by it. According to the view the jury took, the act of dismissal was accompanied by a new contract.] But the particulars bind the plaintiff to recover *pro rata* according to the rate of £160 a year.

Lord ABINGER, C. B.—I think there is no ground for a

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rule. The plaintiff seeks by his particulars to recover a quarter's wages, and under them may recover a month's wages. The meaning of the particulars is, that he claims, on the indebitatus count, the balance of £37, for a quarter's wages at a certain yearly rate of payment, or any other sum not exceeding that amount, to which he is entitled for any shorter period.

PARKE, B.—The meaning of the particulars is merely this, that the plaintiff limits himself to a time not exceeding three months, and a sum not exceeding £37. The defendants might have asked for better particulars, if they thought it necessary. The particulars do not say that the plaintiff claims at the rate of *so much a day*.

ALDERSON, B.—We ought to give particulars of demand rather a liberal than a restraining construction, otherwise we are in effect making two declarations, one to be a trap for the other. The meaning here is, that the plaintiff limits himself to £37 on any indebitatus demand in this action, for any period not exceeding three months.

ROLFE, B., concurred.

Rule refused.

Nov. 24.

TEGGIN v. LANGFORD.

A judge's order imposing costs in the matter of an interpleader order heard at chambers, may be reviewed by the Court.

THIS was a case in which, the sheriff having applied to a judge at chambers for an interpleader order, under the 1 & 2 Vict. c. 45, s. 2, an order was accordingly made, on the 4th July 1842, for the trial of an issue. A summons to rescind that order was afterwards served, and on the 22d July the following order was made by *Cole-ridge, J.*:—"Upon hearing the attornies or agents for the

plaintiffs, for the claimant, and for the sheriff of Somersetshire, I do order, that so much of the interpleader order herein, dated the 4th day of July, 1842, as directs an issue to be tried, be rescinded, no issue having been delivered; and that the said sheriff do forthwith pay to the plaintiffs the produce of the sale under the said order; and that the claimant's attorney do pay the costs of the application (to be taxed) to the plaintiffs, their attorney or agent."

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Warren having obtained a rule nisi for setting aside so much of the latter order as directed the payment of costs by the plaintiff's attorney,

Montague Smith now shewed cause.—The Court has no jurisdiction to entertain this application. Under the 1 & 2 Vict. c. 45, s. 2, the whole discretion as to the costs is vested in the judge before whom the proceedings were originated at chambers, and the Court has no jurisdiction to review his order: *Burgh v. Schofield* (a). [Lord Abinger, C. B.—There no order had been made as to costs, and the Court declined to interpose; but this is an appeal from the decision of the judge.] There is no jurisdiction by way of appeal, where the judge, as in this case, sits as *the Court*. [Parke, B.—Generally speaking, it means subject to be reviewed by the Court, if wrong. Must it not in this case mean, subject to such appeal as judges' orders usually are subject to?] In the 1 & 2 Will. 4, c. 58, s. 4, an express power is given to the Court to review the decision of the judge; but the later statute vests in the judge the same powers and authorities as are by the 6th section of the former act exerciseable by the *Court*.

Warren, contra, was not called upon.

PER CURIAM (b),

Rule absolute.

(a) 9 M. & W. 478.

(b) Lord Abinger, C. B., Parke, B., Gurney, B., and Rolfe, B.

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Nov. 9.

MORGAN v. LEACH and Another.

Where a notice of action to a magistrate was signed by the plaintiff himself, but indorsed by his attorney:—*Held*, that the notice was sufficient, the indorsement by the attorney being all the stat. 24 Geo. 2, c. 44, s. 1, requires.

Held, also, that service by the clerk of the attorney was sufficient, and that the notice need not be served by the attorney himself.

The defendants, who were magistrates, directed the plaintiff, a surveyor of highways, to remove a certain nuisance from the highway, and to fence a pit that was dangerous, and, on his neglecting to do so, convicted him in a penalty for having "wilfully neglected his duty in not removing, or causing to be removed, certain nuisances in and upon a certain highway in the said parish, &c., and not duly guarding a dangerous pit lying on the said highway:"—*Held*, that the conviction was not warranted by the 20th or 73rd section of the Highway Act, 5 & 6 Will. 4, c. 50, and that it could not be supported.

TRESPASS against two magistrates, for assault and false imprisonment.—Plea, not guilty, by statute.

At the trial, before *Rolfe*, B., at the last assizes for the county of Pembroke, the following facts were proved:—The defendants, who were magistrates of the county of Pembroke, having been informed that a dangerous pit existed in the neighbourhood of a certain highway, and that a quantity of dung had been thrown upon the highway by the plaintiff, who was the surveyor, directed him to remove the nuisances and to fence the pit, and, on his neglecting to do so, convicted him under the Highway Act, 5 & 6 Will. 4, c. 50. The terms of the conviction were, that the plaintiff had "wilfully neglected his duty in not removing, or causing to be removed, certain nuisances in and upon a certain highway in the said parish &c., and not duly guarding a dangerous pit lying on the side of the said highway." The plaintiff was kept a short time in confinement under the above conviction. The notice of action, required by the statute 24 Geo. 2, c. 44, s. 1, was signed by the plaintiff, indorsed by his attorney, and served by the attorney's clerk.

On the part of the plaintiff, it was contended that the conviction was bad, and that the defendants were not warranted under the 73rd or 20th section of the act in convicting the plaintiff.—On behalf of the defendants, it was urged that the plaintiff ought to be nonsuited, on the grounds, first, that the notice of action was served by the attorney's clerk, and not by the attorney himself; and secondly, that the notice was signed by the plaintiff, and not by the attorney. The learned Judge thought that

the conviction could not be supported, and overruled the defendants' objections; and the jury having found a verdict for the plaintiff, his Lordship gave the defendants leave to move to enter a nonsuit.

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Evans now moved accordingly.—First, the notice of action, having been signed by the plaintiff, is bad; it ought to have been signed by the attorney. By the 24 Geo. 2, c. 44, s. 1, it is enacted, "that no writ shall be sued out against, nor any copy of any process, at the suit of a subject, shall be served on, any justice of the peace for any thing by him done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, or left at the usual place of his abode, *by the attorney* or agent for the party who intends to sue or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same, in which notice shall be clearly and explicitly contained the cause of action which such party hath or claimeth to have against such justice of the peace." Under that statute, service of notice by the party himself is not sufficient; it must be by the attorney employed. The act must be strictly complied with. In *Taylor v. Fenwick*, cited in *Lovelace v. Curry* (a), *Lawrence, J.*, states it to have been decided that "the statute has prescribed a form which must be implicitly followed; and it admits of no equivalent. The statute was made to introduce a strictness of form in favour of justices, and it must be observed literally." The act contemplated that the justices should have an opportunity of tendering amends, and therefore the object was to require the notice to be given by a person who had a well-known office, or place of residence, which was easily to be found. In *Bennett v. Broughton*, reported in a pub-

(a) 7 T. R. 635.

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lication called "The Justice of the Peace," vol. ii. p. 759, which was an action against a magistrate, it was objected by the defendant that the notice of action was bad, being signed by the plaintiff, and not by his attorney, whereas the statute required that it should not be the notice of the party, but of the attorney or agent: and Lord *Abinger*, C. B., who tried the cause, said, "With regard to the first objection, as I am not quite clear upon that, I will not give any decided opinion, though I have an inclination in favour of the objection." Secondly, the service of the notice of objection is bad, having been made, not by the attorney himself, but by his clerk. It ought to be delivered by a person capable of accepting a tender of amends. [*Gurney*, B.—The act does not require *personal* service; therefore it is not necessary that the attorney himself should deliver it. The justice has a whole month in which to tender the amends.] Thirdly, the learned judge misdirected the jury in saying that he thought the conviction could not be supported, for the plaintiff was properly convicted of a breach of duty, either under the 20th or the 73rd section of the Highway Act, 5 & 6 Will. 4, c. 50. The 20th section enacts, "That if any surveyor, or district surveyor, or assistant surveyor, shall neglect his duty in any thing required of him by this act, for which no particular penalty is imposed, he shall forfeit for every such offence any sum not exceeding £5." The 73rd section enacts, "That if any dung, &c. shall be laid upon any highway, so as to be a nuisance, and shall not, after notice given by the surveyor, be removed, it shall be lawful for him, by order of a justice, to remove the dung, &c. and dispose of the same, applying the proceeds to the repair of the highway." It is submitted, that under the latter section it was the duty of the surveyor to cause the nuisance to be removed, if the party did not remove it upon notice, and that for his neglect to do so he was answerable under the 20th section.

Lord ABINGER, C. B.—I think there is no ground for a rule in this case. The act requires the service of the notice to be by the attorney, and accordingly it is effected by the attorney's clerk. That is equivalent to a service by the attorney himself. Secondly, the notice is not bad by reason of its being signed by the plaintiff; the attorney has indorsed it, and that is sufficient. Thirdly, there is no ground for a rule in respect of the judge's direction, for I think it clear that the conviction cannot be supported.

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PARKE, B.—I am of the same opinion. The signature of the plaintiff did not vitiate the notice; it was an unnecessary act; the statute does not say that the notice shall be signed by any body. Secondly, it was not necessary that the attorney should serve the notice with his own hand. Thirdly, the conviction is bad. The 73rd section does not make it incumbent on the surveyor to remove nuisances; it empowers him to give notice to the parties placing them there to remove them. Again, the act imposes no obligation on him to fence places that are dangerous.

GURNEY, B.—The act does not make personal service upon the magistrate necessary in this case. Nor is it requisite for him to tender amends at the time of giving the notice: the statute allows him a month for that purpose.

ROLFE, B., concurred.

Rule refused.

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Nov. 9.

DAVID WATSON PURDON and THOMAS PURDON, Executors
of DAVID PURDON, v. WILLIAM PURDON.

Assumpsit by the executors of the payee of a promissory note, against the defendant as maker. The plaintiff produced the note with the following indorsement upon it, signed by the defendant and one of the plaintiffs:—"Hull, 1838. Memorandum, that the sum of 1*l.* 7*s.* 6*d.*, one quarter's interest, was paid on the within note. William Purdon, Thos. Purdon:—"

Held, that this was sufficient evidence of an account stated with the executors, without any proof of the time of the testator's death.

ASSUMPSIT by the plaintiffs, as executors of David Purdon, on a promissory note for £110, made by the defendant in the lifetime of David Purdon. There were also counts for money lent by and on an account stated with the testator, alleging promises to him, and on an account stated with the plaintiffs as executors of D. Purdon, and a promise to them as such executors. Plea, the Statute of Limitations.

At the trial before Lord *Denman*, C. J., at the last Yorkshire Assizes, the only evidence given by the plaintiffs was the promissory note (which was above six years old), with the following indorsement upon it:—"Hull, 1838.—Memorandum, that the sum of 1*l.* 7*s.* 6*d.*, one quarter's interest, was paid on the within note. William Purdon (the defendant), Thomas Purdon," (the plaintiff). No evidence was given of the time of the death of David Purdon, the testator. It was objected for the defendant, that the plaintiffs ought to be nonsuited, since, as there was no proof of the time of the testator's death, there was no evidence of an account stated with him at the date of the memorandum, as he might not be alive at that time: and even admitting the memorandum to be evidence of an account stated with the testator, still there was no count upon an account stated with him, and a promise to pay the executors. It was also contended, that as the plaintiff Thomas Purdon was not alleged in the memorandum to be executor, there was no evidence of an account stated with him. The learned Judge overruled the objections; and the jury, under his direction, having found a verdict for the plaintiffs, he gave the defendant leave to move to enter a nonsuit.

Jervis now moved accordingly.—The indorsement upon this note was not sufficient to bar the statute. Although payment of interest admits the currency of the note, it has not the same effect as payment of part of the principal. It is a payment collateral to the principal debt. In *Jones v. Ryder* (a), it was held, that a mere parol statement of an antecedent debt without any new contract or consideration, made within six years before action brought, does not constitute a sufficient cause of action to prevent the operation of the Statute of Limitations. Here the plaintiff was not stated to be the executor, and there was no ground for inferring that the interest had been paid to him. To make an act amount to an account stated, the plaintiff ought to shew something equivalent to a promise to pay.

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PARKE, B.—Surely this was evidence to go to the jury. It was strong evidence of payment of 1*l.* 7*s.* 6*d.* on account of the note. The payment of interest, it is true, does not necessarily prove that the principal money is due, but surely it is evidence of that fact, and but for the objection the jury would have no hesitation in so finding.

The rest of the Court concurred.

Rule refused.

(a) 4 M. & W. 32.

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HEMING and Wife v. POWER.

Slander.—The declaration, after reciting that A. and B., the plaintiffs, were lawful husband and wife, and that B. was the lawful sister of one C., alleged that the defendant spoke of and concerning the plaintiff B. and her intermarriage, and of and concerning C., the false, &c. words following: "It has been ascertained beyond doubt that C. and B. are not only not brother and sister, but man and wife:"—*Held*, first, that the plaintiffs were not bound to prove the introductory averment that B. was the lawful sister of C.; secondly, that the declaration was not bad in arrest of judgment.

SLANDER.—The declaration, after the usual introductory averments in declarations for slander, alleged that the plaintiffs, Dempster Heming and Rhoda Mary Charde his wife, before the committing of the grievances, &c. therein-after mentioned, had been and were lawful husband and wife, and also that before the committing of the said grievances, and at the time of the intermarriage of the said plaintiffs, the said Rhoda Mary Charde was the lawful sister of one Henry Leigh Alleyne, he the said Henry Leigh Alleyne then residing within this realm: yet that the defendant, well knowing the premises, and wickedly and maliciously intending to injure the plaintiffs in their good name and reputation, and to bring them into public scandal, infamy, and disgrace, and to cause it to be believed by their neighbours, and others, that the said Rhoda Mary Charde had been guilty of the crimes and misconduct thereinafter mentioned to have been charged upon her, and to subject her to the pains and penalties by the laws of this kingdom made and provided against persons guilty thereof, to wit, on the 1st day of June, 1841, in a certain discourse which the defendant then had of and concerning the said plaintiffs, and of and concerning their said intermarriage, and of and concerning the said Henry Leigh Alleyne, in the presence and hearing of divers subjects of our lady the Queen, falsely and maliciously spoke and published of and concerning the plaintiffs, and of and concerning their said intermarriage, and of and concerning the said Henry Leigh Alleyne, the false, scandalous, malicious, and defamatory words following, of and concerning the plaintiffs, and of and concerning their said intermarriage, and of and concerning the said H. L. Alleyne, that is to say, "It has been ascertained beyond doubt, that Mr.

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Alleyne (meaning the said H. L. Alleyne) and Mrs. Dempster Heming (meaning the said Rhoda Mary Charde) are not only not brother and sister, but man and wife," (meaning that the said R. M. Charde, being lawfully married to and the lawful wife of the said H. L. Alleyne, had afterwards feloniously and unlawfully married and taken to husband the said plaintiff, Dempster Heming, the said H. L. Alleyne being then alive, contrary to the form of the statute in such case made and provided): And also the false, scandalous, malicious, and defamatory words following, of and concerning the plaintiffs, and of and concerning their said intermarriage, and of and concerning the said H. L. Alleyne, that is to say, "It has been ascertained beyond doubt, that Mr. Alleyne (meaning the said H. L. Alleyne) and Mrs. Dempster Heming (meaning &c.) are not only not brother and sister, but man and wife" (meaning that the said R. M. Charde had been guilty of felony in marrying the said plaintiff Dempster Heming): And also the false, scandalous, malicious, defamatory words following, of and concerning the plaintiffs, and of and concerning their said intermarriage, and of and concerning the said H. L. Alleyne, that is to say, "It has been ascertained beyond doubt, that Mr. Alleyne (meaning the said H. L. Alleyne) and Mrs. Heming (meaning &c.) are not only not brother and sister, but man and wife:" And also the false, scandalous, malicious, and defamatory words following, of and concerning the said plaintiffs, and of and concerning their said intermarriage, and of and concerning the said H. L. A., that is to say, "Mr. Alleyne (meaning the said H. L. A.) and Mrs. Heming (meaning &c.) are man and wife;" by means whereof &c.

The defendant pleaded not guilty.

The cause was tried before *Williams, J.*, at the last Spring Assizes for the county of Leicester, when it was objected on behalf of the defendant that the plaintiffs ought to be nonsuited, inasmuch as there was no proof of the introductory

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averment in the declaration that the female plaintiff was the lawful sister of Henry Leigh Alleyne. The learned Judge overruled the objection, and the plaintiffs obtained a verdict with one farthing damages, leave being reserved to the defendant to move to enter a nonsuit. The learned Judge certified under the recent stat. 3 & 4 Vict. c. 24, s. 2, that the grievance in respect of which the trial was brought was wilful and malicious.

In last Easter Term (April 19),

The *Solicitor-General* moved accordingly on the point reserved, and also in arrest of judgment.—First, as to the nonsuit. The declaration alleges that Mrs. Heming was “the lawful sister of Henry Leigh Alleyne,” and that allegation ought to have been proved, as the essence of the slander rested on the existence of that relationship. The colloquium is “of and concerning the plaintiffs, and of and concerning their intermarriage, and of and concerning the said Henry Leigh Alleyne,” and there is no allegation of any words being spoken except of those three matters. Now it is an established rule, that every essential allegation in the inducement should be proved. In 2 Stark. on Ev. 628 (a), it is said—“Where the declaration avers the existence of particular facts, and that the publication was of and concerning those facts, their existence, if material to the actionable quality of the publication, must be proved.” In *Teesdale v. Clement* (b), which is cited by Mr. Starkie, and which was an action for libel, the declaration alleged that the plaintiff, who was a constable, having arrested certain persons for unlawfully having a human body in their possession, had been ordered by a magistrate to take the body to Surgeons’ Hall, which he did, on which the defendant published of and concerning the plaintiff, that, instead of taking it to Surgeons’ Hall, he had taken it to different places to obtain

(a) 3rd edit.

(b) 1 Chit. R. 603.

a price for it. The plaintiff at the trial not having proved that he took the body to Surgeons' Hall, was nonsuited by Lord *Tenterden*, who held that it was an allegation which it was requisite to prove. [*Parke*, B.—There the proof was essential to the criminal quality of the charge. The present case is totally different, for the previous relationship in which the plaintiff's wife stood towards Alleyne is of no consequence whatever, provided she were his lawful wife before her marriage with the plaintiff; so that in point of fact all those averments as to who Alleyne was might be struck out of the declaration. *May v. Brown* (a) is an authority to shew that the allegation, that the libel was of and concerning the matters aforesaid, does not compel the plaintiff to prove every part of the inducement. It is only necessary to prove so much as is requisite to give to the charge the character imputed to it by the plaintiff.] Assuming the averment to be unnecessary, still, having been made, it cannot be rejected as surplusage. [*Parke*, B.—Either the averment is immaterial altogether, and may be rejected as surplusage, or, if material, it should have been traversed.]

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Then the declaration is bad in arrest of judgment. As there is no allegation of special damage, if the words do not impute felony, they are not actionable. The subject-matter of the charge is bigamy; but inasmuch as the declaration itself alleges that Mrs. Heming and Mr. Alleyne were brother and sister, it is clear that there could have been no valid marriage between them, and consequently in marrying the plaintiff she could not have been guilty of the crime of bigamy. It is no slander to charge a person with a crime of which he could not by any possibility be guilty, because he is in no jeopardy: Buller's N. P. 5. Thus, in *Snag v. Gee* (b), it was held that no action would lie for slander

(a) 3 B. & Cr. 113; 4 D. & R. 670.

(b) 4 Rep. 16.

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in asserting that the plaintiff had murdered J. S. when it appeared that J. S. was still alive. In *Jackson v. Adams* (a), it was held that inasmuch as the property of the bell ropes of a church is in the churchwardens of the parish, it was not actionable to say of a churchwarden that he stole the bell ropes of his parish. [*Parke, B.*—That was clearly only a charge of a breach of trust.] In *Williams v. Stott* (b), the Court appears to have been of opinion that a verbal imputation of fraudulent embezzlement in the office of chamberlain of certain commonable lands belonging to a corporation would not be actionable, on the ground that the party was not in such a situation that he could be guilty of such a felony.

PARKE, B.—I think that in this case we ought to grant no rule.

As to the first objection, that has already received an answer. In the first place, supposing this averment to be an immaterial one, then it was unnecessary to be proved; on the other hand, if it was a material averment, then the defendant, not having traversed, must be taken to have admitted it: but it seems to me it is clearly an immaterial averment, and upon that ground no rule will be granted.

Then as to the other objection, in arrest of judgment, it is this: that the words which are ascribed to the defendant, taken in connection with what the plaintiff has averred, shew that the offence of bigamy could not have been committed, and therefore that Mrs. Heming could not have been in any danger, as the person whom she was charged to have previously married was her brother. If it proceeds upon that ground, it appears to me that there is no foundation for the objection. The complaint against the defendant is

(a) 2 Bing. N. C. 402; 2 Scott, 599.

(b) 1 C. & M. 675.

the making of a false charge against the plaintiff, and if you take the words of the defendant altogether, they clearly amount to a charge of felony, and a false one, against Mrs. Heming. According to the averment in the declaration, it is a charge of felony, for the defendant does not admit she was the sister of Alleyne; on the contrary, his statement is, that Mrs. Heming, who is now married to the plaintiff, instead of being sister to Alleyne, was his wife; if so, she was guilty of the offence of bigamy in intermarrying with the plaintiff. The ground of the matter being actionable is that a charge is made, which, if it were true, would endanger the plaintiff in point of law. Here, if it were true, the plaintiff would be in danger of a prosecution for bigamy, and therefore the matter said to have been uttered is actionable. The averment in the declaration, that she was not the wife of Alleyne, but his sister, appears to me to make no difference in the case; it is no answer to shew that the charge is false, and that is the whole inference to be drawn from what is averred in the declaration. The cases which have been referred to are all distinguishable. With respect to that of *Snag v. Gee*, it appears to me that, according to the true understanding of that case, it is a very different one from the present. There the averment was that the defendant said of the plaintiff, "Thou hast killed my wife;" and there was an allegation in the declaration that he was speaking of a person who was then alive. The allegation must have been such as that the Court could not but imply that, at the time the words were uttered, they were uttered of a person known to the parties in whose presence they were spoken, to be alive; and therefore that they could not infer it was meant to impute a felony. The fact being known that she was alive at the time would shew that the word *kill* was not used in the sense of taking away life. That was also the meaning of the Court in the case of *Williams v. Stott*. The reason why the action lies is, that those persons who heard the slander might

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infer that the plaintiff had been guilty of a felony, and might make a charge founded upon it: but if at the time the words are uttered, there are circumstances which clearly shew the words are not used in the sense of imputing a felony, then the charge falls to the ground, and no action will lie. And it is only on that ground that the case of *Snag v. Gee* can be supported in point of law.

Applying this principle of construction, it seems to me that in this case there is no ground to arrest the judgment. The words import a charge of felony, and must be taken so to have been understood by those who heard them; and that charge is false. That is sufficient to render them actionable in point of law.

ALDERSON, B.—I am of the same opinion upon both points. As to the first, it seems to me that the *Solicitor-General* never escaped from the difficulty which the Court put upon him, from the moment it was admitted by him that this immaterial allegation need not be proved by the plaintiff.

Then as to the second point that has been made, in arrest of judgment, I take the rule to be this:—the words, to be actionable, must impute a criminal offence; that is, the words, if true, must be such that the plaintiff would be guilty of a criminal offence. Here the words are, “that it is now ascertained beyond all doubt that Mrs. Heming and Mr. Alleyne are not brother and sister, but man and wife:” imputing that she was the wife of Alleyne. Surely it is for a jury to say whether the defendant does not mean that she has committed the crime of bigamy. Undoubtedly, if the fact were well known by the persons who heard the words uttered, that Mr. Alleyne was the brother of Mrs. Heming, it would be a very proper question to submit to the jury, that their verdict ought to be that there was no

intention of imputing bigamy, but incest. It might be a question in that case whether the words did not convey an imputation different from that charged in the declaration. But as the case stands, it appears not only that the defendant spoke the words, but that he spoke them with the meaning alleged in the declaration. That question has been submitted to the jury, and very properly found for the plaintiffs.

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ROLFE, B. concurred.

Rule refused.

Balguy, for the plaintiffs, on the same day obtained a rule to shew cause why there should not be a new trial, on the ground of the improper reception of evidence.

Against that rule cause was shewn in Trinity Term last by the *Solicitor-General*, *Daniel*, and *Mellor*, for the defendant; and *Balguy*, *Goulburn*, Serjt., *Hill*, and *Waddington*, were heard in support of the rule.

The Court took time to consider; but now (November 6), *Goulburn*, Serjt., intimated that the judgment of the Court would not be required.

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FURSDON, Executrix of FURSDON, v. CLOGG (a).

Quere, whether a verbal statement, made by a deceased collector of rents, at the time of paying over to his employer monies received by him from the tenants, as to the person from whom he received a particular sum entered by him in the rental, is admissible in evidence against that person?

Construction of a document given in evidence as an acknowledgment of title under the stat. 3 & 4 Will. 4, c. 27, s. 17.

ASSUMPSIT for the use and occupation of premises alleged to have been held by the defendant as tenant to the plaintiff's testator, who died in 1837. The first count stated a promise to pay to the testator in his lifetime; the second, a promise to the plaintiff as executrix. Pleas, non assumpsit, and the Statute of Limitations.

At the trial before *Maule, J.*, at the Devonshire Summer Assizes, 1841, it appeared that the premises in question consisted of a piece of land called the "Four Lords' Land," of which the defendant had been for many years in the occupation, and the property in the several undivided fourth parts whereof had been for a long time in dispute in the Court of Chancery. In the year 1816, the plaintiff's testator obtained a decree of that Court in favour of his title to one undivided fourth part, and for a partition of the estate; and it appeared that the defendant had attended before the commissioner appointed to carry the partition into effect, and expressed no dissent. It was proved that the testator's rents were generally collected by his attorney, a Mr. Law: he, however, on two occasions, had employed one of the plaintiff's tenants, a person of the name of Charley, who was since dead, to collect them for him. Mr. Law was examined as a witness for the plaintiff, and stated that, in the year 1821, he gave Charley the rentals of the years 1820 and 1821 to collect by, and that Charley paid him the aggregate of the sums carried out in those rentals in the paid columns. Among those entries appeared one (in Charley's handwriting) of the sum of £6 as having been received for the premises in question; and Mr. Law swore that Charley stated to him, at the time of making

(a) This case was determined but the documents could not be in last Easter term (April 28), obtained in time to report it sooner.

the above payment, that he had received that sum from the defendant. This evidence was objected to by the defendant's counsel, and the learned Judge inclined to think it inadmissible, but took a note of it. Two letters from the defendant to the testator's attorney were also put in, which, it was contended, amounted to a sufficient acknowledgment of title to prevent the operation of the Statute of Limitations. The first was dated December 5, 1833, and, after a long statement of the expenses incurred by the defendant in the course of the litigation respecting the property, stated that he wished "an arrangement to be made on reasonable terms, and due consideration and compensation to be made." The other letter was dated August 30, 1837, (after the testator's death), and was in answer to an application by the attorney for payment of the arrears of rent; and after stating that the defendant "was involved in law from 1805 to 1816 concerning the Four Lords' Land, which had given him great trouble and expense, and that with respect to the expenses, it was reasonable that the lords of the fee should make him some recompense accordingly," and after detailing certain particulars as to these several claims which had been made to the property, that the plaintiff's testator had been applied to to defend his title as to one-fourth, but had objected so to do, and that "it appeared reasonable that Mr. Fursdon should vindicate his right to the land," rather than that the expenses should fall upon the tenants, the letter concluded by stating that the writer "begged compassion, mercy, and pity, and recompense in a satisfactory manner." The learned Judge thought that these letters amounted to a sufficient acknowledgment of the title of the testator, and accordingly directed a verdict for the plaintiff for the amount claimed, reserving leave to the defendant to move to enter a nonsuit.

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In the following Michaelmas Term, *Erle* obtained a rule accordingly, against which, in Michaelmas vacation,

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The *Solicitor-General* shewed cause, and contended that the declaration of Charley, as to the payment of rent by the defendant in 1821, was clearly admissible, and was sufficient to charge the defendant in this action. He cited 1 Phill. Evid. pp. 312, 321, 325 (8th edit.), *Barker v. Ray* (a), and *Skeffington v. Whitehurst* (b):—and the Court then called upon

Erle and *Taprell*, in support of the rule.—They insisted that the parol declaration of Charley, who was merely a person employed on two occasions only, not a regular steward or agent, was not admissible in evidence; that none of the cases went further than to declare the *written entries* of such a person, charging himself with the receipt of money, evidence after his death, and that it would be very dangerous to extend the rule to mere verbal declarations of such an agent. They referred to the following authorities:—*Higham v. Ridgway* (c), *Doe d. Human v. Pettet* (d), *Ivat v. Finch* (e), *Davies v. Pierce* (f), *Peaceable v. Watson* (g), *Holloway v. Rakes* (h), *Doe d. Foster v. Williams* (i), *Barker v. Ray*, *Woolway v. Rowe* (k), *Walker v. Broadstock* (l), *Carne v. Nicoll* (m), *Doe d. Gallop v. Vowles* (n), *Doe d. Baggalley v. Jones* (o), *Strode v. Winchester* (p), *Marks v. Lahee* (q), 1 Phill. Evid. 311.

Crowder and *Montague Smith*, who also appeared for the plaintiff, were then heard upon this point, and contended

(a) 2 Russ. 67.

(b) 3 Y. & C. 21.

(c) 10 East, 109.

(d) 5 B. & Ald. 223.

(e) 1 Taunt. 141.

(f) 2 T. R. 53.

(g) 4 Taunt. 16.

(h) 2 T. R. 55.

(i) Cowp. 621.

(k) 1 Ad. & E. 114; 3 Nev.

& M. 849.

(l) 1 Esp. 458.

(m) 1 Bing. N. C. 430; 1 Scott, 466.

(n) 1 M. & Rob. 261.

(o) 1 Camp. 367.

(p) 1 Dick. 397.

(q) 3 Bing. N. C. 408; 4 Scott, 137.

that there was no distinction in law as to the admissibility of written and parol declarations made by deceased agents: that it was in all such cases a question for the jury as to the weight and value of the evidence, but that the law of England made no distinction whatever between matter by parol and in writing, except where the writing was by deed.

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The Court took time to consider this point, and in Easter Term, desired that the case should be argued also on the other question, as to the effect of the letters as an acknowledgment of title. It was argued accordingly by

The *Solicitor-General*, *Crowder*, and *Montague Smith*, for the plaintiff. They contended that the letters read in evidence clearly amounted to a sufficient acknowledgment of title, within the terms of the stat. 2 & 3 Will. 4, c. 71, s. 14: that they were in effect an admission of the testator's right to sue for the rent, and an assertion of a claim by way of set-off, by reason of the cost of the litigation about the property.

Taprell (with whom was *Erle*), in support of the rule, argued, first, that the letter of the 30th August, 1837, did not contain a sufficient acknowledgment to prevent the operation of the statute, because it was not made to the party having title to the *land*; and that the word *rent*, in the 14th section, being coupled with the word "*land*," meant a rent-charge or other freehold rent issuing out of the land, not a mere conventional rent for the occupation of the land: and secondly, that the letters, taken altogether, did not import *any* explicit or unambiguous acknowledgment of title in the testator.

The COURT (*a*), however, were clearly of opinion that at

(*a*) Lord *Abinger*, C. B., *Parke*, B., *Alderson*, B., and *Rolfe*, B.

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all events the letter of the 30th August, 1837, which was written in answer to a claim for the rent made on behalf of the testator, was in effect an admission that rent was due, and therefore an acknowledgment of the title of the testator, in whose right the plaintiff, the executrix, claimed the rent. It was unnecessary, therefore, to enter upon the other point, which had been so elaborately argued, since on this ground the rule must be discharged.

Rule discharged.

Nov. 22. *ALSAGER and Another, Assignees, of RICHARD PARKER,*
a Bankrupt, v. CLOSE.

Where a bill of exchange for 1600*l.* was deposited with the defendant by a bankrupt, as an indemnity to a third person against a bond which he had executed to the petitioning creditor, under the 1 & 2 Vict., c. 110, s. 8, and the defendant refused to deliver up the bill on the demand of the assignees of the bankrupt, although they shewed him the bond in a cancelled state; and he

THIS was an action of trover, brought by the plaintiffs as assignees, to recover a bill of exchange for £1600. The defendant pleaded, first, not guilty; secondly, that Richard Parker was not a bankrupt pursuant to the statutes, &c.; and, thirdly, that the plaintiffs were not possessed of the bill as of their own property as assignees: on which issues were joined. The defendant also gave notice of disputing the petitioning creditor's debt, the trading, and the act of bankruptcy.

At the trial, before Lord *Abinger*, C. B., at the London Sittings after Trinity term, it appeared that the action was brought to recover a bill of exchange for £1600, which had been deposited by the bankrupt with the defendant as an indemnity to Messrs. Margetson and Leake against a bond afterwards obtained 800*l.* on the bill:—*Held*, in trover by the assignees for the bill, that the obtaining money on the bill was an actual conversion of the bill, for which the bankrupt, if no bankruptcy had intervened, might have sued, and therefore that the case was within the 92nd section of the Bankrupt Act, 6 Geo. 4, c. 116, and the depositions under the fiat were conclusive evidence of the bankruptcy.

Held (by Lord *Abinger*, C. B.), that the case would have been within that section, even if there had been no evidence of a conversion except the demand and refusal.

Held also, that the production of the bond by the assignees to the defendant in a cancelled state was *prima facie* evidence that it was cancelled with the consent of the obligee.

Held also, that inasmuch as there was a conversion of the whole bill, 1600*l.* was the proper measure of damages, although 800*l.* only remained due on the bill.

which they had executed, jointly with the bankrupt, to John Parker, the petitioning creditor, under the stat. 1 & 2 Vict. c. 110, s. 8. The plaintiffs having demanded possession of the bill, the defendant promised that he would give it up if the bond were cancelled and surrendered. Another demand was afterwards made, and the bond was on that occasion shewn to the defendant with the seals torn off; but he refused to give up the bill, and said he should hold it for Margetson and Leake. No evidence was given by whom or in what manner the bond was cancelled. The defendant afterwards discounted the bill, and raised £800 upon it.

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The plaintiffs tendered in evidence the depositions taken under the fiat in bankruptcy. This evidence was objected to for the defendant, on the ground that this was not a case in which the bankrupt could have brought any action if his bankruptcy had not taken place, and therefore not within the 92nd section of the 6 Geo. 4, c. 16. The Lord Chief Baron, however, received the evidence. The plaintiffs also produced the bond in its cancelled state, but its reception in evidence was resisted, unless evidence were given of the intent of the cancellation, or of its having been made with the knowledge of the obligee. His Lordship overruled the objection, and received the bond in evidence: and the plaintiffs had a verdict, damages £1600, leave being reserved to the defendant to move to enter a nonsuit.

On a former day in this term, *Jervis* moved accordingly, and obtained a rule for entering a nonsuit, or for reducing the damages to £800. On the 18th of November,

Thesiger, Kelly, and W. H. Watson, shewed cause.—The question in this case is, whether, supposing these circumstances to have taken place before the bankruptcy, the bankrupt could have maintained the action; and it is submitted that he could, for if the bond was cancelled, the

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bill had done its duty, and ought to have been given up by the defendant. The question whether the bankrupt could have maintained trover, is the test to be applied as to whether the depositions are or are not evidence under the 92nd section of the act. Now the bankrupt, but for his bankruptcy, could have maintained the action, for there was ample evidence of a conversion. The material words of the clause are—"for any debt or demand, for which the bankrupt might have sustained any action:" and in *Robson v. Alexander* (a), it was held that trover is an action for a *demand*, within the meaning of that section. It is immaterial that the refusal to give up the bill was made to the assignees. It was so held in *Fox v. Mahoney* (b), and that the depositions were conclusive evidence in a case where the bankrupt might have sued, if no bankruptcy had intervened, though the conversion which gave the right of action took place after the act of bankruptcy. That case was followed by *Jones v. Fort* (c), which was trover for bills of exchange, the declaration containing counts stating a possession by the bankrupt and a conversion in his time, and other counts stating a possession by the plaintiffs as assignees, and a conversion in their time; and Lord *Tenterden* held, that if the plaintiff relied on the depositions as proof, they must abandon the counts on the possession of the assignees; thus determining the question by the record, and not by the facts of the case. That opinion was, however, overruled in *Kitchener v. Power* (d). There Lord *Denman*, C. J., in delivering the judgment of the Court, says, "But, upon consideration, we are of opinion that there is a fallacy in the application of this test, for although the record must be taken to contain a statement of all circumstances formally necessary for the maintenance of the issue by the plaintiffs, the question

(a) 1 M. & P. 448.

(b) 2 Cr. & J. 325.

(c) Moo. & Malk. 196.

(d) 3 Ad. & Ell. 232; 4 Nev. & M. 710.

is not whether the same issue in form could have been sustained, merely substituting the bankrupt's name as plaintiff for that of his assignee; but whether the bankrupt, if no bankruptcy had occurred, could have maintained any action or suit for the recovery of the *same debt or demand*. A reference to the record cannot answer this latter question."—And accordingly it was held, that the depositions were evidence in an action of trover brought by the assignees, though the declaration stated a conversion in the time of the assignees only, if the cause of action were one for which the bankrupt himself might have sued. Now here it is clear that the bankrupt might have brought trover for the bill, if he had satisfied the bond, or procured it to be cancelled. [*Parke, B.*—This question was considered by this Court in the case of *Hare v. Waring (a)*, though not decided. That was a case in which the bankrupt, not having fulfilled his contract, could not have maintained any action, inasmuch as there was no "debt or demand" for which he could have sued. I have always understood the rule to be, that the depositions were admissible where, on the facts of the plaintiff's case, the bankrupt could have maintained the action in case no bankruptcy had intervened.] It is the fact of the conversion, and not any particular evidence of it, that gives the right; if the bankrupt could have had a right of action in case no bankruptcy had intervened, so have the assignees after the bankruptcy. There is no exception in the 94th section, except the single case of the bankrupt giving notice to dispute the bankruptcy. The demand here is the conversion; the assignees must make the demand, and not the bankrupt, and the cause of action would accrue from that. If the bankrupt could have sued on a demand made at that time, supposing there was no bankruptcy, so can the assignees now, and the depositions are evidence.

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(a) 3 M. & W. 362.

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Secondly, there was sufficient *prima facie* evidence that the bond was cancelled by the authority of John Parker, the party for whose benefit it was intended. In Shepard's Touchstone, p. 70, it is said, that "if a deed be delivered up to the party that is bound by it to be cancelled, and it be so; or if he that hath the deed doth by agreement between him and the other cancel the deed; by either of these means the deed is become void." Here John Parker's consent was proved by the cross-examination of the bankrupt. How can the defendant set up this excuse, when he offered to give up the bill on the bond being given up? The producing the bond in the possession of the obligor, is a ground for the jury to presume that the parties have had John Parker's assent to the cancellation of the bond.

Thirdly, the damages ought not to be reduced, as the assignees have not admitted the receipt of the £800. The defendant had no right to raise money on the bill.

Jervis, Whateley, and J. Henderson, were now heard in support of the rule.—First, the depositions were not in this case evidence to prove the bankruptcy, but the plaintiffs were bound strictly to prove the trading, petitioning creditor's debt, and act of bankruptcy. The question, no doubt, turns on the construction of the 92nd section of the Bankrupt Act; the true test is, might the bankrupt have sued if the bankruptcy had not intervened? and it is agreed that that question is not to be tried by the record alone, but the circumstances are to be taken into consideration: *Fox v. Mahoney, Kitchener v. Power*. But there is no case in which the depositions have been held admissible in *rover*, where, there having been no conversion in the time of the bankrupt, the only proof of a conversion after the bankruptcy is by a demand of the assignees, and a refusal: in all the cases cited on the other side, there was an *actual conversion*, for which the bankrupt might have sued. The

demand and refusal are only evidence of a conversion at that time. If it be said there was an actual conversion by the defendant's receipt of the £800, then the bill is satisfied as to that amount. [Lord Abinger, C. B.—It is a conversion of the whole. If I give a man a bill for a specific purpose, and he goes and receives money upon it, that is a conversion of the bill.] The defendant was bound to receive the money when due, if it were tendered to him. It was his duty to present the bill and to get it paid, if it fell due when in his hands. A demand and refusal, whether the latter be qualified or unqualified, cannot per se operate as an actual conversion. A conversion means an unauthorized dealing with the chattel for the use of the party: and of that the real owner, be he who he may, may avail himself. But the mere demand by the assignees creates no such right of action, and, if the fiat were superseded, would not give the bankrupt a right to sue, because the demand must be made on behalf of *the plaintiff* in the suit. The defendant's refusal might be on the express ground that he kept the property for the bankrupt.

Secondly, the bond was not proved to have been so cancelled as to entitle the plaintiffs to demand possession of the bill. The whole of the evidence is, that the bond was produced with the seal torn off; and it was stated by the bankrupt, that his brother, John Parker, never had been paid, and had refused to execute a release. The mere taking off the seal from a deed is not a cancellation; Shep. Touch. 70; it must be done animo cancellandi: *Perrott v. Perrott* (a). [Lord Abinger, C. B.—That clearly shews that it is a question of evidence.] Then upon whom is the onus of proving how and under what circumstances it was taken off? Not surely upon the defendant, who is a mere stakeholder. It is not a matter within his knowledge, but within that of the obligee, whose duty it is to

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(a) 14 East, 423.

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—The defendant sets up the existence of the bond as the ground of a lien; it is for him, therefore, to explain that which is *prima facie* the strongest evidence of cancellation.] It ought to have been put to the jury whether John Parker had given up the bond intending to release the debt. If he were to sue the bankrupt to-morrow, the defendant could not compel him to plead his bankruptcy.

Thirdly, the damages ought to be reduced to the sum of £800. The action of trover is not brought for the recovery of the specific chattel, but in the alternative, for damages, and the estimate of the damages is the value of the chattel. Here this bill is available only for £800. If it were sued upon, the plaintiffs might be met with evidence of part payment.

LORD ABINGER, C. B.—This case has been very fully and ably argued; but I retain my opinion, that this rule cannot be sustained on any of the points which have been brought before us. [His Lordship stated the facts of the case, and continued:—] Several objections have been made on the part of the defendant. The first is, that the proceedings under the fiat were not admissible in evidence in this case, but that the bankruptcy ought to have been strictly proved. I think, however, that this objection is answered by a reference to the 92nd section of the Bankrupt Act; the effect of which is to deprive any person who is sued by the assignees of a bankrupt of the right to dispute the bankruptcy, in any case where the subject-matter of the action is such that the bankrupt might have sued upon it but for his bankruptcy. It is said, however, that the bankrupt could not have sued here, if no bankruptcy had intervened, all the other circumstances remaining the same. But, supposing the bond to have been cancelled, and the indemnity satisfied, would not the bankrupt have had a right to sue for this bill? My

brother *Parke* (a) doubted whether this demand and refusal would be evidence, so as to entitle him to recover; and I agree in thinking that it would not, and that he must have made another demand, and proved another refusal. But still, if nothing had appeared beyond the demand and refusal, I am of opinion that the case would be within the statute, the bankrupt and his assignees being identified in interest in the subject-matter of the action, and that a stranger ought not to be allowed to dispute the bankruptcy, which the bankrupt himself had not disputed. Where, indeed, the party claims by a title paramount to that of the assignees, and adversely to the bankrupt, then they must strictly prove the bankruptcy. Therefore, if the case rested on the demand and refusal, I should think it was within the statute, although undoubtedly the bankrupt must make another demand on his own part before he could commence his action. My brother *Parke*, however, considered that there was quite sufficient evidence of an actual conversion. The bill was deposited with the defendant for a special purpose, and his duty was to hold it until that purpose was determined. I do not think that a man who holds a bill for a particular purpose of this nature has a right, without authority, to go and receive money on the bill. I think, therefore, the receipt of the £800 was an actual conversion; so that, quâcunque viâ, the bankrupt might have maintained the action. That disposes of the first objection.

In the second place, it is said that the production of the bond in a cancelled state (although it was admitted to be cancelled by the defendant) was not sufficient; but that the plaintiffs ought to have gone further, and shewn a cancellation with the consent of John Parker. This, however, is a question of evidence; and can it be doubted that the production of the bond with the seals torn off was

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(a) *Parke*, B., was present during the argument of the plaintiffs' counsel, on the 18th November, but not on this day.

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prima facie evidence of a cancellation?—especially when it was proved to have been out of the hands of the assignees of the obligor. I think that, under such circumstances, it lay upon the defendant to rebut that evidence, and that there was a strong case to go to the jury that the bond was in fact cancelled by the desire of John Parker; taking into consideration, moreover, the fact that it was produced with memoranda annexed, which also had been held by John Parker for his own benefit.

The third question is only as to the amount of the damages. If the defendant will bring £800 into Court, and deliver up the bill, the verdict may be entered for a nominal sum; but he converted the whole bill, and the plaintiffs are entitled to recover the value of the whole at the time of the conversion. The defendant cannot be less liable for having destroyed the property to the amount of one half.

GURNEY, B.—I am of the same opinion on all the points. I think the depositions are admissible in evidence; and that it would be contrary to the manifest intention of the Bankrupt Act to allow a stranger to dispute the bankruptcy where the bankrupt himself could not. With respect to the conversion, it was quite complete at the time the defendant received the £800; and there can be no ground for reducing the damages, because by the very act of conversion the bill was deteriorated in value.

ROLFE, B.—I did not hear the argument on the part of the plaintiffs, but, as far as I have heard the case to-day, I entirely concur in my Lord's judgment. The argument as to the evidence of cancellation might properly enough have been addressed to the jury, but it is impossible to say that the production, by the obligor, of the bond in a cancelled state, is *no* evidence of a cancellation with the consent of the obligee.

Rule discharged.

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Nov. 14.

ACRAMAN v. COOPER and Another.

TROVER.—The declaration stated, that the plaintiff theretofore, to wit, on the 10th day of October, 1841, was lawfully possessed, as of his own property, of certain goods and chattels, to wit, two receipts, each of the said receipts purporting to be a receipt for £10,500, being £85 per share of 800 shares of £100 each, in the capital stock of a Company, known as the Royal Mail Steam Packet Company, and two scrip receipts relating to money paid on shares of the said Company, two other scrip receipts, and two other pieces of paper, of great value, to wit, of the value of £2000; and being so possessed, the plaintiff afterwards, to wit, on the day and year before mentioned, casually lost the said goods and chattels out of his possession, and the same then came to the possession of the defendants by finding; concluding in the usual form.

Plea, that before and at the said time when, &c., in the said declaration mentioned, to wit, on the 1st day of June, A. D. 1841, the defendants were lawfully possessed as of their own property of two receipts, and two scrip receipts, which are the same two receipts and two scrip receipts in the said declaration mentioned; and that, being so possessed, the defendants afterwards, and before the said time when &c. in the said declaration mentioned, to wit, on the day and year last aforesaid, delivered the same to one John Doe, to be kept by him to and for the use of the said defendants; and that the said John Doe, afterwards and before the said time when, &c., in the declaration mentioned, to wit, on the day and year last aforesaid, delivered the same two receipts and two scrip receipts to the said plaintiff; and the defendants further say, that

Trover for two receipts. Plea, that before and at the time when &c. the defendants were lawfully possessed as of their own property of the same receipts, and that being so possessed, the defendants afterwards, and before the said time when &c., delivered the same to one J. D., to be kept by him to and for the use of the defendants, and that J. D. afterwards and before the said time when &c., delivered the same to the plaintiff; and that afterwards and before the said time when &c., the plaintiff casually lost the same out of his possession, and the same by finding came to the possession of the defendants; and that the defendants afterwards refused, upon the request of the plaintiff, to deliver the same to the plaintiff, as they lawfully might for the cause aforesaid,

which is the same conversion of which the plaintiff has complained:—*Held*, that the plea was bad for duplicity, and for not confessing a conversion.

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afterwards and before the said time when, &c., in the said declaration mentioned, to wit, on the day and year last aforesaid, the plaintiff casually lost the said two receipts and two scrip receipts out of his possession, and the same, by finding, came to the possession of the defendants; and that the defendants afterwards refused, upon the request of the plaintiff, to deliver the same to him the plaintiff, as they lawfully might for the cause aforesaid, and which is the same conversion in the said declaration mentioned, and of which the plaintiff hath above complained against the defendants. Verification.

Special demurrer, and joinder therein.

The following points were marked for argument by the plaintiff. That the plea neither traverses nor confesses and avoids any allegation in the declaration. That it contains an argumentative denial of the plaintiff's title only. That a demand and refusal is not a conversion of the thing refused, but, at most, only evidence; and that such a refusal by a party who is the real owner, and in actual possession, is not even evidence of a conversion. That for the same reason the colour given to the plaintiff in the plea is bad. That the plea is double; and that it is wrongly concluded.

Kelly, in support of the demurrer.—This not a plea giving colour, but amounts to an argumentative denial of the allegation in the declaration. The declaration alleges "that the plaintiff theretofore, to wit, on &c., was lawfully possessed as of his own property, of certain goods and chattels, to wit, two receipts," &c. Now the plea is not a direct denial of that allegation, but the defendants say that, before and at the time of the conversion, they the defendants were lawfully possessed of the goods. Then it alleges that which *may* amount to a conversion, and then, by way of giving colour, states that they the defendants delivered the receipts to John Doe to be kept by him for their use, and

afterwards and before the said time when, &c., he delivered the same to the plaintiff; which is the only colour given. The plea then alleges, that the plaintiff lost the receipts out of his possession, and that the same came to the defendants' by finding; and that the plaintiff demanded the same, but that they the defendants refused to deliver them, as they lawfully might. This is not according to the rules of pleading; for in giving colour, a defendant is bound to shew a possessory title in the plaintiff at the time of the conversion. If that is not done, the defendant must take issue on one point. Here the defendants have not shewn a possessory title in the plaintiff, but on the contrary, have shewn that the plaintiffs had not such title at all, because they say, that before the conversion the plaintiff casually lost the receipts out of his possession. Although the plaintiff once had the actual possession of them, that possession ceased when he had lost them. The plea clearly shews that at the time of the conversion the plaintiff had not either the actual possession or the right of possession. The colour must be a continuing colour down to the time of the conversion. Com. Dig., Pleader (3 M, 41). If the defendant pleads false matter, the colourable title must exist at the time of the conversion. In *Morant v. Sign* (a), which will perhaps be relied upon on the other side, the plea shewed an actual possession in the plaintiff at the time of the conversion. The defendant ought to have pleaded in this case that the plaintiff was not lawfully possessed, and not to have stated facts which merely go to shew it by inference. In Stephen on Pleading (b), it is said, "A mere possession without some shew of title is insufficient in law to give such colourable right against the true owner. In such case the usual and regular course would be not to plead in confession and avoidance, but to adopt the general issue, *not guilty*, which

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(a) 2 Mee. & W. 95.

(b) 2nd ed., 245.

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puts the plaintiff's lawful possession of the close in issue, as well as the mere fact of the trespass." But further, the plea is bad for duplicity, inasmuch as it amounts to a denial of the possession at the time of the conversion, and at the same time professes to admit a conversion. The defendants say, first, "The chattels are not yours, for we had the right to the actual possession;" and then they say, "You demanded, and we refused them; and that is the conversion alleged." The plea assumes certain facts, which do not shew a conversion at all. The defendants ought to have confessed the conversion in terms, and then have avoided it.

Jervis, contra.—The plea is good, and is according to the form in common use. It contains nothing which is inconsistent with the allegations in the declaration. The declaration shews sufficient title to enable the plaintiff to recover the receipts. Then the defendants say, "That is very true, but before you were possessed of them we were, and we gave them to J. D. to hold for us, who gave them to you,"—a title good as against all the world, except the defendants; "but then you lost and we found them, and refused to give them up, as we lawfully might." There is no distinction between express and implied colour. In trover, it is sufficient to confess a temporary right in the plaintiff. In *Rockwood v. Feasar (a)*, which was an action of trover, the defendant pleaded, "that long before the conversion supposed to be, J. S. was possessed of these goods, as of his own goods, at B. in Norfolk; and that he, before the conversion supposed, did casually lose them, and they came to the hand of J. Palmer, by trover, who gave them to the plaintiff, who lost them in London; and the defendant found them,

(a) Cro. Eliz. 262.

and afterwards did convert them to his own use by the command of the said J. S., as it was lawful for him to do; and it was moved, that this is no plea, for it amounts to the general issue. But all the justices held it a good plea, for it confesseth the possession and property in the plaintiff, against all but the lawful owner." That is exactly this case. There the plea shewed, that the plaintiff was possessed before he lost the goods; and there is a note to that case, that "the plea was devised by *Coke* to alter the trial." *Kynnersley v. Barnard* (a) was trover for a horse, and selling him, and converting the money to the defendant's use. "The defendant confesseth that it was the plaintiff's horse, and that one J. C. found and delivered him to the defendant, to restore upon request; whereupon he redelivered him to the said J. C. before the action brought, absque hoc that he sold him, and converted the money to his proper use. And it was thereupon demurred, because he ought to have pleaded the general issue, and he could not traverse the conversion. But all the Court held, although it be doubted in the books, 27 Hen. 8, 2, 33 Hen. 8, 4 Edw. 6, Bro. 'Action sur le case,' and Dy. 121, yet, forasmuch as in this action the substance is the conversion, and without it the action cannot be founded, that it well might be traversed. But in regard he hath here traversed the conversion of the money to his own use, which is not materially alleged in the declaration, but is superfluous, and by his traverse hath made it to be part of the issue, the traverse, therefore, is ill in that point. And the demurrer being upon the traverse, it was adjudged for the plaintiff." In *Holler v. Bush* (b), which was an action of trespass, the defendant pleaded that the horse in question was the horse of J. S., and that the plaintiff took and impounded it, and the defendant took him by replevyng, &c.;

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(a) Cro. Eliz. 554.

(b) 1 Salk. 394.

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and in that case the Court held, "that this plea was no more than the general issue, for it does not so much as admit a possession in the plaintiff, for the taking and impounding gained no possession to the plaintiff, but the horse was thereby only in custody of the law, and so no colour of action in the plaintiff; otherwise, perhaps, if it had been *cepit et detinuit*." That case was decided on special grounds, and it is no authority against the defendants. *Morant v. Sign* is strongly in point; and although in that case there was an allegation that the defendant took the goods out of the possession of the plaintiff, it is necessary only to allege a demand and refusal. There the plea was held good, though the demurrer raised the very same objection as in the present case. In what respect was that plea better than the present? It alleged that the oak tree, by severance, became the defendant's property; and that is clearly in form like the present plea. But further, the plea is not double. You may either deny the property, or you may admit the property and traverse the conversion. Both formerly were included in the general issue; but now, without denying the conversion, you may say that the plaintiff had no property, and but a bare possession, which would be inoperative against the defendant. This, in fact, is a special plea of not possessed. The plaintiff is not embarrassed by the form of plea, because it does not present various issues.

Kelly, in reply.—The cases cited from Cro. Eliz. were decided on other grounds. That of *Rockwood v. Feasar* is principally relied on. Now, it is not shewn in what form that case came before the Court, but it does not appear that it was on special demurrer. [*Parke*, B.—It must have been decided on demurrer.] It only appears, in terms, that it was on some motion which involved the cor-

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rectness of the plea. Besides, it is at variance with other previous cases. In *Warde v. Blunt* (a), which was an action of trover for corn and hay, the defendant pleaded, "that before the trover he was seised of certain land in Burton, in the county of Stafford, in fee, and the corn and hay was growing upon that land, and he cut them as his proper goods, and was of them possessed till he lost them; and they came to the hands of the plaintiff by trover, and he lost them again; and they came to the hands of the defendant, and he converted, as it was lawful for him to do." That is exactly the present case. The plaintiff demurred specially, and it was argued for him, "that the plea amounted to the general issue, for it is no more than they were his proper goods, and then he ought to plead non culp.; and if it be a plea, he ought to traverse, without that they were the goods of the plaintiff, for the plaintiff declareth that they were his proper goods, and he ought to answer it." For the defendant it was argued, that "although this plea amounts but to a general issue, yet he should not have demurred, but ought to have moved the Court that he should plead another plea or a nihil dicit be entered; for demurrer being joined upon it, this is confessed, and then it is to be adjudged for the defendant. But the Court held, that inasmuch as this was the special cause shewn upon the demurrer, it is good, and then shall be adjudged for the plaintiff; and afterwards the plaintiff had judgment." There the point was clearly decided on special demurrer, but in the subsequent case of *Rockwood v. Feasar*, the case may, at all events, have been before the Court on general demurrer, when the plea would be good. As to the other point, the plea is clearly double. [*Parke, B.*—The plea ought to be good by way of confession and avoidance, but here the defendant does not confess the

(a) Cro. Eliz. 146.

Esch. of Pleas, conversion. In substance the plea is sufficient, but it is informal.] In the case of *Earl of Manchester v. Vale* (a), where the defendant justified the trespass with cattle, but did not confess it, it was held, that the plea being bad in part, although it justified some part well, was bad for the whole. This is really not so much matter of form as it may at first appear to be. *Morant v. Sign* was not fully argued, and counsel had leave to amend.

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LORD ABINGER, C. B.—When a case comes before us on demurrer, and the Court, without hearing counsel on both sides, express an opinion which induces one of the counsel to pray leave to amend, I should be glad if such cases were not reported, because the matter is terminated by the discretion of the counsel, and there is no solemn judgment of the Court. I think it would be well if such cases were not reported; I do not mean, however, to question the authority of the case of *Morant v. Sign*, though it is matter of observation that the case of *Warde v. Blunt* was not noticed in the argument; and moreover, the particular point now taken, that the plea ought to allege a possession of the property at the very time the conversion took place, was not urged in that case. It is not necessary, however, to question the authority of that decision, for we are of opinion that this plea is bad, on the ground of duplicity, and also on the ground that it does not confess the conversion. Before the new rules, where a defendant in trover pleaded specially, the plea always confessed the conversion in the manner complained of; so also, in an action of trespass, you could not plead a special plea of justification, without admitting a trespass. This plea does not confess a conversion, but it attempts to set up a denial of a conversion, by a special statement that the conversion complained of was a demand

and refusal, which is not a conversion, but only evidence of a conversion. *Erech. of Pleas, 1842.*

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PARKE, B.—I am of the same opinion. It is argued that the plea gives proper colour; but, in order to be a good plea, it ought to amount to a confession. The matter of colour gets rid of the objection that the plea amounts to the general issue, but then it ought to be a good plea by way of confession and avoidance. This plea is not so, because there is no confession of the conversion complained of. *Morant v. Sign* is certainly not of the same authority as if it had been solemnly decided, after argument by the counsel on both sides; but I have no doubt with respect to the propriety of that decision, so far as I am concerned. The present case, however, is different; because, in the first place, there is no admission of the conversion complained of, and more especially because the matter alleged as a conversion does not amount to a conversion per se, but is only evidence of a conversion.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

THE PARRETT NAVIGATION COMPANY v. ROBINS.

Nov. 14.

THIS was an action of trespass, for taking four tables of the plaintiffs. The defendant by his plea justified the taking of one table, on the ground, that the plaintiffs were duly fined £1, at a court of sewers for the southern division of the county of Somerset, for not cutting the weeds grow-

By an Act of Parliament, 6 & 7 W. 4, c. 41, (local and personal), certain persons were incorporated for the purpose of improving the navigation of the River Parrett, and they were thereby empowered to take tolls in respect of the transit or conveyance of goods thereon:—*Held*, that in the absence of any express enactment on the subject in the act, the duties of the company were confined to matters relating to the navigation, and that they were not liable for the sewerage of the river, as to clear away weeds, which, though injurious to the adjoining lands, were no detriment to the navigation.

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ing in the bottom of the river Isle, between Muchelney-bridge and Muchelney-lock. The defendant also pleaded three other pleas, in which he stated that the plaintiffs were duly fined £2 for not cutting the weeds growing in the bottom of the river Parrett, between Thorney-bridge and the southern boundary of the borough of Langport Eastover; £3 for not cutting the weeds growing in the bottom of the river Parrett, which lies within the borough of Langport Eastmore; and £4 for not cutting the weeds growing in the bottom of the river Parrett, between the northern boundary of the borough of Langport Eastover and Hathe. The plaintiffs, in their several replications to these pleas, denied that they had been duly fined, whereupon issue was joined. The facts were stated, under a Judge's order, for the opinion of the Court, in the following case:—

The rivers Isle and Teo, which have been immemorially navigable, fall into the river Parrett a little above Langport, and this river, which has also been immemorially navigable, runs through Langport and Bridgewater into the Bristol Channel. These rivers drain a considerable tract of country, and are under the control of the commissioners of sewers for the southern division of the county of Somerset, who cause them to be viewed frequently by their officers, and who present to the courts all nuisances, annoyances, and impediments therein. Weeds grow up from the bottom of the rivers in the spring of the year, and die in the fall. During the time they are growing, the water is buoyed back by them, and after much rain such water inundates the low lands adjoining. Some of these weeds have immemorially been cut at different times of the summer, so as to prevent them being an impediment to the passage of the water. The neighbouring lands are greatly benefited in winter by the floods, and also in some degree in dry summers, by the water ponded back by the weeds. The corporation of Langport, who hold lands, and receive the rents and profits of them, have the exclusive right of fishery

in the river Parrett, both above and below the town of Langport, to the extent of the bounds of the borough of Langport, which right of fishery, together with the lands, they have held prescriptively from the Crown, but not as parcel of or as annexed to the manor; and the Bishop of Bath and Wells, as Lord of the adjoining manor of Huish Episcopi, through which the river Parrett runs, has the exclusive right of fishery above the borough of Langport, to the extent of his manor. The corporation of Langport have always, out of the rents and profits arising from their lands and otherwise, cut the weeds within their fishery. The weeds have never been cut in the river Parrett above Langport, nor in the river Teo. In the river Isle, they have been cut by the occupiers of ancient inclosures opposite to and to the length of their frontages, as far as the middle of the river. Opposite to the common moors, the occupiers of tenements, to which right of stackage in the moors belonged, have cut specified portions of the weeds, and which portions were marked by posts put into the ground. Below Langport, the weeds in the Parrett through the parishes of Curry Rivell and Aller, the only parishes where it was necessary to cut them, were from beyond the time of living memory down to the passing of the Poor Law Amendment Act (4 & 5 Will. 4, c. 76), cut by the overseers of the poor of the respective parishes. These overseers had no lands as overseers, and the expenses were charged in their accounts. Since the passing of the act, these expenses have been disallowed by the auditors of the union, and the weeds have remained uncut. In the year 1836, an act 6 & 7 Will. 4, c. ci, local and personal, was passed, intituled, "An Act for improving the Navigation of a portion of the River Parrett, and for making a Navigable Canal to Barrington, all in the county of Somerset," under which the Parrett Navigation Company, constituted by that act, have levied the toll thereby authorized to be taken, and have erected several locks across the river, and

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they have purchased strips of land abutting upon the rivers Isle and Parrett on one side thereof, throughout the whole of the navigation, for making a towing path on, and have actually formed and are now using that path. They have also made and completed various improvements in the navigation of the Parrett, and have accelerated and improved the drainage of the neighbouring lands. It would be rather a benefit of that Company, although injurious to the landowners, to leave the weeds uncut.

Fines of £1, £2, £3, and £4 have been imposed upon the Parrett Navigation Company, by the court of sewers, for not cutting the weeds in the rivers Isle and Parrett, as follows, viz.:—The fine of £1 for not cutting the weeds in the river Isle; the fine of £2 for not cutting the weeds in that part of the river Parrett which is above Langport; the fine of £3 for not cutting the weeds in that part of the river Parrett which comprises the fishery of the Langport corporation; and the fine of £4 for not cutting the weeds in that part of the river Parrett below Langport. The whole of which portions of the rivers are comprised in the Parrett Navigation Act.

On the 22nd of September, 1841, at the sewers court, held at Langport, it was agreed that the opinion of this Court should be taken as to the liability of the Navigation Company to cut these weeds, and the power of the commissioners of sewers to compel them to do so by fine, or any other and what mode; when all the necessary proceedings, and the levying of the distresses, were to be admitted to have been made in due form, so as to bring before the court the real questions of the liability of the Company to cut the weeds, and the jurisdiction of the commissioners in imposing the fines, which questions were as follows:—As to the fines of £1 and £2, whether the Parrett Navigation Company, or the land-owners, or the commissioners of sewers, or all or any two and which of them jointly, and to what extent, are liable. As to

the fine of £3, whether the Parrett Navigation Company, or the Langport corporation, or the land-owners, or the commissioners of sewers, or any and which of them, and to what extent, are liable. As to the fine of £4, whether the Parrett Navigation Company alone, or the Parrett Navigation Company and the land-owners jointly, and to what extent, or the land-owners alone, or the overseers of the poor, or the commissioners of sewers, are so liable. And whether, in the above instances, the commissioners had power to impose fines on the company, or to compel them in any other and what mode to cut the weeds. And it was agreed, that, in submitting the points for the opinion of the Court, it should be left to the Court, if they should think fit so to do, to mark the liability of the company, (if they should be found to be liable at all), either solely or jointly, by dividing the fines; either party to be at liberty to refer to any of the clauses in the above act "for improving the navigation of a portion of the river Parrett, and for making a navigable canal to Barrington, all in the county of Somerset."

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The plaintiffs' points marked for argument were, that they were not subject to the obligation of cutting the weeds growing in the river mentioned in this case; and that, at all events, they were not finable for any omission in cutting them.

The defendant's points were, that the right given to the plaintiffs by 6 Will. 4, c. ci, (local and personal), to demand and receive toll in respect of the conveyance of goods on the rivers Parrett and Isle, was such a beneficial interest in those rivers, as to render the plaintiffs liable to the burthen of cleansing and scouring those parts of the two rivers to which the plaintiffs' right extends.

Cowling, for the plaintiffs.—The company of proprietors are not liable. They were incorporated for the particular purpose of making the Parrett a navigable river, and of

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constructing a canal. The preamble of the act of Parliament shews that; for it recites those, and those only, as the objects contemplated by the legislature; and the 3rd section enacts, "that the said company shall be and are thereby authorized and required to make, complete, and maintain certain improvements in the navigation of the said river Parrett, as may be necessary to secure a depth of three feet of water in some part of the stream throughout the whole course of the said river," &c. There is no express direction in the act that the company are to be liable to cut these weeds, nor by implication is any such burthen imposed upon them. They are merely to do such things as are essential for or tend to the improvement of the navigation; to defray the expense of which, they are, by the 121st section, empowered to take "tolls, rates, or duties," for tonnage. The 73rd section, which directs the company to fence off &c. lands adjoining the towing-path, enacts, that "in case the said company shall make use of the present embankments of the said river Parrett, or of any river or stream which falls into the same, for such towing-paths or other works, they shall thenceforward be liable to the future repairs of such part of the banks as they may use as aforesaid." Under that section, the company would clearly not be liable to repair any part of the banks not used by them, but according to the argument on the other side they must be so now. The company have a discretionary power, under certain restrictions, to allow the water to come up the river, and in the event of any damage arising therefrom to the adjoining lands, they are made responsible. But there is no direction to be found in the act as to the matter in question, and therefore the charge of clearing away the weeds must remain with those to whom it originally belonged.

Manning, Serjt., for the defendant.—A common-law obligation rests upon persons having power to navigate a

river, to cleanse and scour it, inasmuch as they have the benefit of the navigation. In the Book of Assize, 37, pl. 10, there is the following passage:—"Commission fuit ag al certaines gents denquĩ dun river que fuit estopp a le anu-sans de pais, & per q̃ux & en que def. fuit estopp & per enq̃st fuit trouve q̃ il fuit estopp per cause de non user puis la prim̃ pestilence, & q̃ il naũ pas este mondř de teps donc memoř ne court, ne q̃ nul devoit ceo mondř de droit, mes ils disont onstř que L'abbe de D. avoit seignioury dun part per le ewe, & le countee de H dauter part, & q̃ ils avoient pischerie en m̃ la river, & q̃ iiij villes & nosme lour nosmes avont lour passage en mesm la riř pour lour easemēt; & ce p̃sentmēt fuit maude en bank le Roy, & hors de ceo record issist bře a distř L abbe & le cōtee & aux y les iiij villes, de r̃ndř, per q̃ ils ne duissent monder ceo fosse &c. & L abbe & la countee viendront, & dis q'lz ne duissent estř charge, depuis q̃ fuit trove per m̃ la pres q̃ nul de droit duist mondř le riř & a pluis fort q'l puit estre pris tous les villes q̃ avont cōmon passage & easemēt de m̃ la riř duissent ceo monder. Greene. donqz vous ne dedites pas q̃ vos naves pischeř illonques et issuit ceo est profit, *et saches de cert q̃ en cas si soit trove q̃ les villes nout my lour pas-sage en cel river*, que vous deux serra charge del mondř entierment; & sic ad judicium, &c." Here the plaintiffs have the benefit of this navigation, and are empowered to take the toll, and therefore they are liable to cleanse the river. It matters not whether they are solely liable, or whether other persons are liable with them, because if they are liable at all, they are finable under the statute of 23 Hen. 8, c. 5, which gives the commissioners of sewers jurisdiction: Year Book, 32 Edw. 2, fol. 1, pl. 2. In the *Case of the Repairs of Bridges*, &c. (a), it is said, "He who hath the land adjoining ought of common right, without prescription, to scour and cleanse the ditches next to the way to his land, and

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(a) 13 Rep. 33.

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therewith agreeth the book of 8 Hen. 7, 5. But he who hath land adjoining, without prescription, is not bound to repair the way. So, of a common river; of common right, all who have ease and passage by it, ought to cleanse and scour it; for a common river is as a common street, as it is said in 22 Ass. and 37 Ass. 10. But he who hath land adjoining to the river is not bound to cleanse the river, unless he hath the benefit of it, scil., a toll or a fishery, or other profit." That is an express authority, as here these places have the benefit of a toll upon the river. In *Warren v. Dix* (a), a jury impanelled to inquire and present at a court of commissioners of sewers, presented that A. was benefited by the sewers; and he received a summons to shew cause why he should not pay; he neglected to traverse the presentment, and a distress was levied for the amount of the rate; and it was held at Nisi Prius that these facts were a justification in an action of trespass for taking the distress, as the presentment, if duly made, and not traversed, justified the commissioners in issuing the warrant of distress. That shews that where the commissioners have jurisdiction, they may fine.

Cowling, in reply.—There is no general rule of law which imposes this duty of cleansing the river upon the company, as arising out of the right to take toll, and therefore the liability, if any, must arise out of the act of Parliament. In the *Lancaster Canal Company v. Parnaby* (b), *Tindal*, C. J., in delivering judgment in the Court of Exchequer Chamber, says, "The principal objection in this case was, that the clause recited in the declaration, and which is therein stated to have cast a duty on the company to remove the obstruction caused by the sunken boat, was not obligatory, but was an enabling or permissive clause only. And we are all of that opinion. Neither the clause recited,

(a) 3 Car. & P. 71.

(b) 11 Ad. & Ell. 230, 242.

nor anything in the act of Parliament contained, imposes such a duty on the defendants below: and the allegation in the declaration, as to the duty of the company, seems to have been founded on a mistake as to the true meaning and effect of that clause." To impose any such liability as that contended for would be a great hardship upon the company. It is found here that the cutting of the weeds would be injurious, and it is not said that the weeds were any nuisance to any one. Suppose the owners of the adjoining land were liable *ratione tenuræ* to cut these weeds, this, being an affirmative act, would not take away their liability. There is nothing in the act which shews an intention to cast this liability upon the company, and there is no general rule of law which applies to it. The company are therefore not liable.

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LORD ABINGER, C. B.—I am of opinion that the Court of Sewers cannot enforce these fines on the plaintiffs. It appears to me that the act of 6 & 7 Will. 4, c. 101, so far as it relates to the river Parrett, was passed for the purpose of improving the navigation of a portion of that river, and gave toll to the company of proprietors for that purpose. The company have a right to do whatever is essential for carrying out the purposes of the act; but it does not charge them with any liability in respect of matters not essential for the improvement of the navigation; and the case expressly states that it will be for the benefit of the company to leave the weeds alone. Even supposing that the parties who take toll on a river are liable at common law to cleanse it, still here the toll is given for the purposes of the navigation, and the omission complained of is beneficial for the company; and I cannot conceive how they can be liable to a fine for acting as the legislature has directed.

PARKE, B.—The simple question is, what is to be done under the act of Parliament for the toll which it authorizes

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the company to take? We must, therefore, inquire from whom the company are to take toll, and for what purposes it is imposed by the act of Parliament. Now, looking to the 121st section, I think it is clear that the act authorizes them to take toll, not with any view to sewerage, but entirely with a view to render the river navigable. No doubt it is their duty to do all such things as are essential for the proper navigation of the river. That duty they have performed; and it seems to me, on this short ground, that the commissioners of sewers have no jurisdiction to impose these fines. As to the common-law liability, the plaintiffs may be bound at common law to do whatever is requisite for the navigation; but here it is sought to impose a fine in respect of an act of omission, the performance of which would be a detriment to the navigation.

GURNEY, B., concurred.

ROLFE, B.—The company have not an exclusive right of navigation, but all persons may navigate the river on payment of reasonable toll.

Judgment for the plaintiffs.

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TOBIN v. CRAWFORD and Others.

On the trial of a cause in which there were several issues, the plaintiff had a general verdict, leave being reserved to the

THIS was an action of assumpsit for freight, to which the defendants pleaded, first, non assumpsit; secondly, a special plea, to which there was a demurrer; and thirdly, a special custom of trade at Liverpool. The issues in fact were defendants to move to enter a nonsuit, or a verdict for the defendants. A rule was obtained accordingly, and thereupon it was agreed, at the suggestion of the Court, that the facts should be stated in a special case for the opinion of the Court. On the argument of the case, the Court gave judgment for the defendants, and the verdict was accordingly entered for them, and this judgment was afterwards affirmed on error in the Exchequer Chamber:—*Held*, that the defendants were entitled to the costs of the trial; and that although one of the issues was given up by them at the trial.

tried at the Liverpool Summer Assizes, 1837, when the plaintiff had a verdict on both issues, damages 74*l.* 4*s.* 5*d.*, leave being given to the defendants to move to enter a nonsuit, or a verdict for them. The plaintiff had judgment also on the demurrer. The defendants subsequently moved pursuant to the leave reserved at the trial, and obtained a rule accordingly. On cause being shewn, it was suggested by the Court, and agreed by the parties, that the facts should be turned into a special case, with liberty to either party to turn the case into a special verdict. The special case was argued in Easter Term, 1839 (*a*), when the Court gave judgment for the defendants, and the verdict was accordingly entered for them on the first and third issues. The plaintiff thereupon turned the case into a special verdict, and brought a writ of error, and on argument in the Exchequer Chamber, the judgment of this Court was affirmed (*b*). On taxation, the Master allowed the defendants the costs of the trial.

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Ellis having obtained a rule calling upon the defendants to shew cause why the Master should not review his taxation, and why he should not be directed to allow the plaintiff the costs of the trial of the issues in fact, or that such costs be disallowed to the defendants,

W. H. Watson now shewed cause.—The leave reserved at the trial, and the subsequent entry of the verdict for the defendants, places them in precisely the same situation as if the verdict had been found for them on the trial.—The Court called upon

Ellis to support the rule.—If the rule had been argued, there could not have been a nonsuit or verdict for the defendants, but only a new trial, for the plaintiff gave evi-

(*a*) 5 M. & W. 235.

(*b*) 9 M. & W. 53.

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dence which entitled him to have the case submitted to the jury. Besides, there was an issue joined on the custom, which was abandoned by the defendants. *Thomas v. Hawkes* (a) is in point. There, after verdict for the plaintiff, and a rule for a new trial granted, the parties agreed to a reference, the costs to abide the event. The arbitrator found for the defendant, yet the Court held that he was not entitled to the costs of trial. The only distinction between that case and the present is, that here the rule was obtained to enter a verdict for the defendant; but that, for the reasons already mentioned, makes no real difference.

LORD ABINGER, C. B.—Here the rule granted by the Court was to enter a nonsuit, or a verdict for the defendant: on that rule the Court had power to do either, but for the sake of convenience, the facts were stated in the form of a special case, on which the same result followed, namely, a judgment for the defendants. I think, therefore, that on the verdict being entered for the defendants under the judgment on the special case, the plaintiff was liable to the costs of the trial.

PARKE, B.—The leave reserved to enter a verdict for the defendants makes the difference between this case and those of *Thomas v. Hawkes* and *Jolliffe v. Mundy* (b).

GURNEY, B., and ROLFE, B., concurred.

Rule discharged.

(a) 9 M. & W. 53.

(b) 4 M. & W. 502.

PRYME v. TITCHMARSH.

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THIS was an action of debt, which was tried before the undersheriff of Cambridgeshire on the 6th October, 1842, when the plaintiff had a verdict, damages 3*l.* 7*s.*

On a former day in this term, *Cleasby* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had, on affidavits which stated, that during the trial the defendant came into Court, and finding that one of the jurymen was the same person who had served him with process in the action, he informed his attorney thereof: no objection, however, appeared to have been made at that time. It was subsequently discovered that the jury who tried the cause were all persons resident in the town of Cambridge, and that none of their names was in the jury list for the county. *Farmer v. Mountfort* (a) was cited to shew that this was irregular. An affidavit filed in opposition to the rule stated that the defendant's attorney had been shewn the list before the jury were sworn, had looked over it, and had expressed himself satisfied.

A cause was tried under a writ of trial directed to the sheriff of Cambridgeshire, by a jury of persons resident in the town of Cambridge, none of whose names were on the jury list for the county; but as it appeared that the defendant's attorney had seen and looked over the list of jurors before they were sworn, and had expressed himself satisfied, the Court held that the defendant was thereby precluded, after verdict for the plaintiff, from objecting to the irregularity.

Quære, whether there is any right of challenge of jurors, on the trial of a cause under a writ of trial.

Macaulay now shewed cause.—The statute 3 & 4 Will. 4, c. 42, s. 17, which gives the Court or a Judge the power to direct issues joined in certain actions to be tried before the sheriff of the county where the action is brought, &c., directs that a writ shall issue to the sheriff, commanding him “to try such issue or issues by a jury to be summoned by him,” &c. How does it appear that the jury so summoned in this case was not a jury empowered by law to try the issue? There is nothing in the affidavits to

(a) 8 M. & W. 266.

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shew that the jurors had not the qualification required by the Jury Act, 6 Geo. 4, c. 50, s. 1. The 13th section of that act requires that the venire facias shall direct the sheriff to return "twelve good and lawful men of the body of his county, qualified according to law;" and section 14 requires the sheriff to return "the names of men contained in the jurors' book for the then current year," &c.: with a proviso, that if there shall be no jurors' book in existence for the current year, it shall be lawful to return the jurors from the jurors' book for the year preceding. It is submitted, first, that this is a direction to the sheriff upon a matter to which the writ of trial has no relation whatever: but secondly, supposing it to refer to the summons on a writ of trial, these affidavits do not sufficiently shew that the names of the jurors were not in the jurors' book for the current year. They may be in some book which the sheriff is authorized to use. The jury lists may mean those which were revised in the month of September, under the 6 Geo. 4, c. 50, s. 10.

But further, this objection, if it existed, was waived by the acquiescence of the defendant's attorney, who, knowing the persons who composed the jury, looked over the list and expressed his satisfaction with them. He does not state that he did not then know the disqualification now alleged against them. On this subject, the case of *Regina v. The South Holland Drainage Committee Men* (a) is in point. [Lord Abinger, C. B.—If the attorney had not expressed his satisfaction with the list, the sheriff might have summoned other persons.]

Cleasby, contra.—There could be no waiver of the objection, unless the attorney knew the circumstances of the case; and there is nothing on the affidavits to shew that

(a) 8 Ad. & E. 429; 1 P. & D. 79.

he knew the jurors were not on the list. He had a right to assume that the due course of law had been observed. In *Farmer v. Mountfort*, there was no such denial of knowledge as is required here. [*Parke, B.*—The proceedings may be avoided if you object at the proper time and place, whereas here you acquiesce.] Not with knowledge. [*Parke, B.*—It is immaterial whether with or without knowledge, because you agree to take that jury.] But how could the objection be waived? The party has here no right of challenge; and this is a writ giving the sheriff a particular authority, which if it be not followed, the proceeding is void altogether. On writs of inquiry, and generally in proceedings before the sheriff, there is no right of challenge. [*Parke, B.*—If there be no right of challenge, that is a reason why you ought to take the objection at the earliest possible period. You ought to make inquiry before you submit to have the case tried by that jury; but if you do so submit, you are bound.]

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LORD ABINGER, C. B.—I do not pronounce any definitive opinion whether the sheriff was bound to take the jury from persons whose names are in the jury list; but I found my opinion on the other ground, that the defendant is precluded, after his acquiescence at the trial by his attorney, from saying that the cause was not tried by a proper jury. He was bound to make inquiry, if he meant to take advantage of such an objection.

PARKE, B.—I am of the same opinion. It is not necessary to decide whether the sheriff was bound to take a jury from the jury book, nor whether on a writ of trial there is any right of challenge; the latter point, especially, might require consideration. It is quite sufficient to say, that the party ought to take such an objection at the earliest period, and to make inquiry into the circumstances. It would be altogether unjust to allow him to lie by and take

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the chance of a verdict, and then come and set aside the proceedings, on an objection such as this, with respect to which he had the means of knowledge; more especially when it appears that he actually approved of the jury who tried the cause.

GURNEY, B., and ROLFE, B., concurred.

Rule discharged, with costs.

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DOE *d.* DANIELL and Others *v.* WOODROFFE.

By marriage settlement, purporting to be made in pursuance of articles recited in

it, an estate was conveyed to the husband and wife, and the heirs of their bodies:—*Held*, that they thereby became tenants in tail special, and that a court of law could not construe the deed as making them tenants for life, with remainder to their issue in tail, even supposing that such be the construction to be put upon the articles by a court of equity.

An estate being limited by marriage settlement to the use of A. and his wife, and the heirs of their bodies, and A. having died, leaving his widow and three children, viz. G. an only son and L. and H. daughters, the widow, in 1735, by deed poll, in consideration of an annuity granted to her by her son, and of natural affection, "granted, surrendered, and yielded up" the estate in question to the son in fee; and he afterwards, during her life, suffered a recovery. The widow died in 1767; G. died without issue in 1779, having devised the estate to trustees to secure the payment of an annuity to W., the only son of his sister L. (who was then dead), and subject thereto to B. the eldest son of W., for his life, with remainder to the defendant, his second son. In 1790, B. entered, on his father's death, into possession of the entirety of the estate, claiming under the will of G., and subsequently did various acts in the character of devisee for life:—In 1814 he suffered a recovery of one moiety, and in 1816 conveyed the entirety of the estate to mortgagees in fee. In 1818, M., the descendant of the other co-parcener, H., at the request of B. suffered a recovery of a moiety, which it was declared should enure (subject to a term to secure a sum of money to M.) to the use of B.'s mortgagees.

Held, first, that the deed-poll of 1735 operated as a covenant to stand seised, and created a base fee, determinable by the entry of the issue in tail:

Secondly, that although G., being estopped by the recovery suffered by him, was not remitted to the estate tail, yet, for the same reason, no right of entry accrued until his death, and therefore the period of twenty years, for the operation of the statute of limitations against the issue in tail, was to be calculated from his death in 1779, and not from the death of his mother in 1767; consequently, that the entry of B. (in 1790) was not barred by lapse of time:

Thirdly, that although B. entered under the will, and indicated an intention to take the estate under it for his life only, this intention was immaterial, and he was remitted, nolens volens, as to his moiety, to the original estate tail, which was barred by the recovery of 1814: and

Fourthly, that either his possession enured to the benefit of his coparcener M., so as to render the recovery of 1818 effectual as to the other moiety, or operated to confer on him, B., an estate in fee by wrong, which, being conveyed to the mortgagees in 1816, gave them a good title against the defendant, who claimed as devisee under the will of G.

and N. H. Nugent; the second by W. J. J. Drury; the third and fourth by H. W. Seaton; the fifth and sixth by W. H. Colyer and J. Colyer; and the seventh and eighth by W. M. Maitland. It was tried at the Surrey Assizes in 1839, when a verdict was found for the plaintiff; but a rule for a new trial having been obtained, at the suggestion of the Court, it was agreed by the parties that the facts should be stated in a special case, with liberty to turn it into a special verdict.

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George Woodroffe, being seised in fee of the premises in question, executed indentures of lease and release in the year 1710, the release being made between George Woodroffe, of the first part, Robert Woodroffe, his brother, and Hester, the wife of Robert, of the second part, G. Duncomb, of the third part, and certain trustees of the fourth part. It recited that articles had been made upon the marriage of Robert with Hester, in 1699, by which George had agreed to charge some part of his estate with £3000, to be paid to Robert, in case George left issue male, and also to settle lands of the value of £10,000 upon Robert and Hester, and the heirs of their two bodies, in such manner as in the said articles was mentioned, with remainder to the right heirs of Robert, in case George died without issue male, or otherwise to secure the sum of £10,000 to Robert, to be laid out in the purchase of land, to be settled upon Robert and Hester, and the heirs of their bodies; and that it had been agreed that the lands thereby conveyed should be settled in satisfaction of that sum. George thereupon conveyed the lands in question to his own use for life, with remainder to his sons successively in tail male, with remainder to the use of Robert and Hester his wife, and the heirs of their bodies issuing, as by the said recited articles the same were to be limited, with remainder in fee to Robert and his heirs. These articles were not produced at the trial or on the argument. Robert died in 1710, leaving three children by Hester, a

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son, George Woodroffe, his heir-at-law, and two daughters, Lettice, the wife of W. Billinghamurst, and Hester, the wife of T. Y. Caverley. George, the brother of Robert, died in 1713, childless. Hester, the widow, upon his death, entered, and by a deed-poll dated 13th of September, 1735, which recited that, by virtue of the settlement, the premises were vested in her for her life, and the immediate remainder belonged to her son George, she, in consideration of natural love and affection, and of an annuity granted to her by an indenture of the same date by her son George, granted, surrendered, and yielded up the premises in question to George, his heirs and assigns for ever. George then entered, and, by a bargain and sale inrolled, dated 22nd of November, 1735, conveyed the lands to G. North, his heirs and assigns, until a recovery could be suffered, which should enure to the use of George in fee-simple. In Michaelmas Term, in the same year, a recovery was suffered, in which North was tenant, and George vouchee. By indentures of lease and release, dated the 25th and 26th of November in the same year, George, upon his marriage, conveyed the premises to trustees to his own use for life, with remainders to his children by the marriage, remainder to himself in fee; and upon his second marriage, in 1765, he executed a similar settlement by lease and release. In 1767, Hester, the widow, died without having done any other act to bar her estate. George, the son, died in 1779, without issue, and, by his will, devised the premises to N. Nicholas and J. Batson, and their heirs, upon trust to pay to his nephew, the Rev. W. Billinghamurst, an annuity of £200, with the usual powers of distress, entry, possession, and perception of rents, for better securing the same, and subject thereto, to the use of his great-nephew, William Billinghamurst the younger, for life, remainder to trustees to preserve contingent remainders, remainder to the use of the first and other sons of William Billinghamurst the younger in tail male, and in de-

fault of such issue to the use of the defendant, then George Billinghamurst, for life, with remainders over. The testator directed that every person entitled to his estates should take the surname and bear the arms of Woodroffe, upon pain of forfeiture. At the time of the death of George Woodroffe, the testator, Hester Caverley, his sister, then a widow, was living, and Lettice Billinghamurst, his other sister, was dead, having left the Rev. W. Billinghamurst, the annuitant, who was of full age, her only child. The devisees in trust entered into possession, and paid the annuity until the month of January, 1790, when the Rev. W. Billinghamurst died, leaving William Billinghamurst, his eldest son and heir-at-law, and the defendant, his second son, him surviving. The former attained his majority the same year, and thereupon assumed the name and arms of Woodroffe by royal license, and took possession of the property.

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In 1793, 1800, and 1803, William Billinghamurst, then William Woodroffe, executed several instruments, to the latter of which the defendant was a party as a co-lessor. In these William stated himself to be tenant for life only, and dealt with the estate as such; but in the year 1814, he conveyed a moiety of the lands by lease and release to R. Edwards and his heirs, to the intent that he might become tenant to the præcipe, and that a recovery might be suffered of that moiety, which should enure to the use of R. G. Edwards, for the term of 500 years, in order to secure payment of certain sums of money, and after payment thereof, to the use of the said William Woodroffe in fee. In 1814, a recovery was accordingly suffered of that moiety, in which William Woodroffe was vouched. In 1816, by lease and release, the latter of which recited two deeds, wherein it was stated that William Woodroffe was tenant for life under the will of his great uncle, and by which he granted two annuities to W. H. Colyer, secured by terms of ninety-nine years, if he should so long live,

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William Woodroffe mortgaged the whole of the lands to R. Stewart and M. Drury in fee simple, as a security for a loan of £10,000, and R. Edwards conveyed to them his term. In 1817, R. Stewart conveyed all his estate to J. Hunter and P. Newman.

In 1774, Hester Caverley, who was the other co-heiress, had died, leaving an only daughter, Ann Walker, then married, her surviving. She also had died in 1797, leaving Jane, the wife of D. Watherston, her only child, at that time a married woman. D. Watherston died in 1803, and Jane, in 1810, married W. M. Maitland, one of the lessors of the plaintiff. By lease and release, dated March, 1818, in the latter of which W. M. Maitland, and Jane, his wife, were mentioned as conveying parties, it was recited that William Woodroffe had entered into possession upon the death of George Woodroffe, and had enjoyed the estate since that period, but that Jane Maitland was in fact or in right tenant in tail of a moiety of the lands, though, William Woodroffe having held the possession adversely to her and her ancestors, her remedy had been barred: and R. Stewart, M. Drury, J. Hunter, S. Newman, and William Woodroffe conveyed a moiety of the premises to F. Croft in fee, to the intent that he might become tenant to the præcipe in a recovery to be suffered of it, in which J. Seaton should be the demandant, and which should enure to the use of W. M. Maitland for a term of 500 years, for the purpose of raising £4,500, and subject thereto to R. Stewart and M. Drury in fee, as a further security for the £10,000. These deeds were never executed by W. M. Maitland or his wife, but in May, 1818, they executed a lease and release to the same effect, save that they did not contain the recital of adverse possession. In Easter Term, in the same year, a recovery of this moiety, in which they were vouched, was suffered.

William Woodroffe, or the parties claiming under him, continued in possession of the whole of the premises till

his death, which occurred in 1824. He left no issue. The defendant then entered, and took the names and arms of Woodroffe. W. M. Maitland never entered, and has not received any portion of the £4500. The estate of R. Stewart and M. Drury has become vested in W. J. J. Drury, one of the lessors, and by him conveyed to J. F. N. Daniell, F. B. Long, P. Le Geyt, and N. F. Nugent, also lessors.

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It was agreed that the Court should be at liberty to inspect the deeds, and draw the same inferences as a jury.

The question for the Court was, whether the plaintiff was entitled to recover on any one or more of the demises contained in the declaration.

The case was argued in last Trinity Term (May 30, and June 1), by

Hodgson, for the lessors of the plaintiff.—Three points were made on moving for the rule in this case, in behalf of the defendant. First, that the settlement of 1710, having been made in pursuance of articles, ought to be reformed, so as to make the estate created by it correspond with that contemplated by the articles, and that the Court ought accordingly to consider Robert and Heaster Woodroffe to have been tenants for life only. But the terms of the articles and of the settlement are in fact precisely the same: they form *one* limitation only, not two limitations; and even if this Court could exercise the functions of a court of equity, and reform the deed, it would not be warranted by any authority in making such an alteration as is here proposed. Where articles are made providing for a settlement to the use of the intended husband for life, and then, with or without intermediate remainders, to the use of the heirs of his body, the courts of equity have said, that finding two distinct limitations intended by those words, they will not apply the rule in

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Shelley's case (a), so as to turn those two limitations into one. But no authority is to be found in which, upon a single limitation to the use of the husband and the heirs of his body, any alteration has been made; and the limitation in this case to Robert and Hester, and the heirs of their bodies, is in like manner one single limitation, and falls within the same principle. The courts of equity appear also to have considered, that if a joint estate tail has been created under such circumstances as that it is in the power of the parties *jointly*, but not of *one* of them only, to bar the entail, that is not an improvident settlement, and the deed by which it is created would not be reformed. The plain answer, however, upon this part of the case is, that a court of law has no power whatever to reform a deed: and whether this deed would be deemed good or bad in a court of equity, in a court of law it can receive no other construction than that the husband and wife were made thereby tenants by entireties in tail, and that Hester became by survivorship sole tenant of the entirety in tail.

The second ground on which the rule was obtained was, that as William Woodroffe had taken a benefit under the will of George Woodroffe, he was bound by the doctrine of election to make good the will. This also is purely a question for a court of equity. A court of equity, under such circumstances, declares that the party has elected to take under the will, although he derives his title aliunde, and follows up this declaration by a direction that he shall convey accordingly: but the Court does not declare that his legal estate is altered or affected thereby.

Lastly (and which is the substantial question in the case), it was contended, that at the time of the commencement of this action, there was subsisting, under the operation of the deed of 1735, a base fee or determinable interest,

which has not ceased, and would not cease until failure of issue of Robert and Hester Woodroffe, and which is not vested in any of the lessors of the plaintiff. The recital in the deed of 1735, that by virtue of the settlement of 1710 Hester was tenant for life only, and that the remainder expectant on her death belonged to her son, George, was a mere mistake; he had no estate whatever in the premises. The first question therefore is, what was, under these circumstances, the effect of that deed. The old doctrine of law—which was not exploded until Lord *Holt's* time—was that tenant in tail could not, by a rightful assurance, convey an estate for more than *his life*. It may however be conceded, that, in accordance with the decision of the Court in *Machell v. Clarke* (a), this deed, being an innocent conveyance, created an estate of inheritance or base fee, determinable on failure of the issue of Robert and Hester, but, as the defendant contends, defeasible also by the entry of any person claiming as issue of the body of Hester. One of the grounds upon which the judgment of the Court in that case is put by Lord *Holt*, is important to be referred to: he says, “It is no prejudice to the issue in tail, and therefore no breach of the statute *de donis* :” and that “if an act which drives the issue in tail to his formedon, will not be a breach of the statute, much less will it be a breach of the statute *to drive the issue in tail to enter*, to avoid a bargain and sale by his ancestor.” There it was held that the deed (which was a covenant to stand seised) had no operation, because the estate was limited thereby to the tenant in tail himself for his life, and *after his death* to his son in tail, and the latter estate, therefore, was not to commence in possession; for the title of the issue in tail, per formam doni, would then be paramount to the title under the deed. That case was confirmed in *Goodright v. Mead* (b)

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(a) 1 Lord Raym. 778; 2 Salk. 619; 7 Mod. 18.

(b) 3 Burr. 1703.

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and *Stapilton v. Stapilton* (a). This deed indeed is not a covenant to stand seised; it is in form a surrender; but in order that it may not fail of effect, it may be construed to operate as a covenant to stand seised, according to the doctrine laid down in *Roe v. Tramarr* (b), *Doe d. Milborn v. Salkeld* (c), and *Doe d. Lewis v. Davies* (d); and George Woodroffe therefore took under it an estate by virtue of the Statute of Uses. Now if the estate created by this deed were merely a fee determinable on failure of issue of Robert and Hester Woodroffe, it might unquestionably be said to be still subsisting; but the estate was also defeasible, and was in fact long since defeated, by entry of the issue. Hester, on her death in 1767, left George her heir in tail, whereby the estate tail became vested in him in possession, subject to the estate created by the deed of 1735. If that estate had vested in any other person than him, he, George, might then have entered and restored his title under the entail, and if he had completed his assurances, might then have suffered a valid recovery, and settled the estates to the uses of the settlement of November 1735. The recovery so suffered by him in his mother's lifetime was merely void as against her issue; at the time it was suffered, and the settlement executed, he was in possession, and so continued until his death in 1779, when the title in tail was split into two undivided moieties, the issue of his two sisters, Lettice Billinghamurst and Hester Caverley, being entitled in coparcenary. Now, a well-known and beneficial doctrine of the common law was, that if a person who had a right of entry to restore an estate, to use the expression of the old books, by any means "happed upon the possession," that was held to operate as a *remitter*, and the law held him to be in under his older and better title. There were undoubt-

(a) 1 Atk. 2.

(b) Willes, 682.

(c) Id. 673.

(d) 2 M. & W. 503.

edly exceptions to this rule: first, when he took the defensible title by his own act or consent, which George Woodroffe must be taken to have done here, and *he* therefore was not remitted; secondly, where a defective or tortious assurance had cast the possession upon him by force of the Statute of Uses; because the right had thus arisen from the operation of an act of Parliament, to which the assent of everybody was to be presumed, and which ought not to be construed to do a wrong: and as the conveyance of 1735 undoubtedly operated by virtue of the Statute of Uses, it must be admitted that on this ground also George was not himself remitted. But these exceptions are of a purely personal nature, and are applicable only to the *first taker*; and although George was not remitted, that was on grounds personal to himself, and which could not affect his successors. *He* took by virtue of the Statute of Uses; but not so his co-heirs in tail; and therefore when William Billinghamurst, being the heir in tail of Lettice as to a moiety, entered in 1790, on his coming of age, his entry put an end, as to that moiety, to the determinable fee created in 1735, and he was at once remitted to his more ancient title. And, as to the other moiety also, his entry would *primâ facie* enure to the benefit of his co-heir in tail, and establish *his* title also. The case of *Doe d. Barrett v. Keen* (a) is an authority to shew that such would be the effect of his entry in contemplation of law, and that the co-heir in tail would have been entitled so to treat it, if he had entered in right of his estate *upon a stranger*: but it will be urged on the other side, that inasmuch as William Billinghamurst took possession (as probably he did) in right of his estate for life under the will of his great uncle, and not intending to assert his title under the estate tail, his entry cannot be so regarded. But the answer is, that his entering under

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to be remembered that Hester died in 1767; George occupied till 1779, when he died, and the trustees continued in possession till 1790. There was then a period of twenty-three years from 1767 to 1790, during which a possession continued in parties who claimed not *under*, but in effect *adversely to*, the title to the estate tail. That being so, the entry of William Billinghamurst was too late to have any effect in defeating the base fee created by the deed of 1735. The first question is, whether, when a defeasible estate of this nature has been created, and the title of the tenant in tail to defeat it has accrued more than twenty years, he is, upon his entry under some other title or assurance, to be remitted to the estate tail. If the Statute of Limitations does not apply to such a case, neither would it though a period of five hundred years had elapsed. The entry of a person for the purpose of remitter is not in this respect to be distinguished from an entry for any other person, and it is equally barred after the lapse of twenty years. The words of the 21 Jac. 1, c. 16, are general and unlimited:—"That no person or persons shall at any time hereafter make *any entry* into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title, which shall hereafter first descend or accrue to the same." This means, as has been clearly settled, not a right or title of the individual, but a right or title descending upon any person through whom he claims. Hence it is, that the omission of a party during twenty years to assert his title to an estate tail which descends upon him, bars all the succeeding issue as well as himself. *Tolson v. Kaye (a)*. Here the title of the issue in tail first accrued in 1767, on the death of Hester, and the entry of William Billinghamurst in 1700 could not operate to revive that estate. [Lord *Abinger*, C. B.—The issue in tail had no right to enter until the death of George.] But the

(a) 3 Brod. & B. 217.

right to determine the base fee accrued on the death of Hester, and George was bound to have done some act in assertion of his title to the estate tail; this he failed to do, and his laches and that of the trustees, for twenty years following, concluded their successors. [Lord *Abinger*, C. B.—According to that argument, if George had survived Hester twenty-one years, his possession during that time would have barred the estate tail.] Undoubtedly; no entry having been made or other act done in support of it. [Lord *Abinger*, C. B.—The sisters or their heirs would say they had no right until his death.] The same might be said if he had not been the person in possession, but such an argument clearly could not have availed in that case. If the base fee had been created in favour of an entire stranger, the sisters and their issue would equally have had no right of entry until the death of George; and if he had survived twenty years, without doing any act to determine the base fee, they would certainly have been barred. There is no greater hardship upon them in the present case than there would be in that. They might with equal justice, in either case, complain that they are not allowed to enter: the answer is, that the Statute of Limitations, whereby the legislature intended to protect the titles of persons actually in possession, if those who are otherwise entitled do not choose within the prescribed time to assert their title, has plainly and expressly so enacted; and no distinction can exist in principle, whether such an estate has been created in favour of a stranger, or of the immediate issue in tail. If George had entered intending to defeat the base fee, or if his entry or any act done by him had had the effect of defeating it, the issue undoubtedly would not have been barred; but under the circumstances, the defeasible estate continued to subsist, and *his* actual possession under it, although he was the person entitled to the estate tail, but to which he was not remitted, did not prevent the operation of the Statute of Limitations. Unless he was remit-

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ted, there is no ground for any distinction between his possession, and that of a mere stranger. By his recovery he acquired a fee-simple, and he conveyed that estate by the marriage settlement; and the parties claiming under that settlement are entitled to the protection of the statute. If it had been originally made by the deed poll of 1735, direct to the trustees, his possession would certainly have been a bar; and the fact that it was made through him makes no difference in principle. Suppose a person wrongfully in possession to grant to the party entitled to an estate tail in the premises a lease for twenty-one years, under which he enters and occupies for the term, he would not be remitted, because the estate came to him by his own act; and, although the rightful owner, his occupation would be of an adverse character against the estate tail, and would bar the right to it, both as against himself and the issue. The real question upon the Statute of Limitations (which it has always been held ought to receive a liberal construction) is, whether the possession has been of an adverse character to the title which is set up: and the doctrine of laches, upon which that statute is founded, is just as applicable to the possession of a tenant in tail, who omits to do any act to defeat a base fee under which he entered, as it is to that of a perfect stranger. [*Rolfe, B.*—What means had George, after the death of Hester, of re-vesting the estate under the original settlement?] He might have disclaimed to hold under the defeasible estate, or asserted his title to the estate tail. The object of the Courts, in excluding from the operation of the doctrine of remitter the case where the party acquired the possession by a conveyance made under the Statute of Uses—which was framed for the purpose of vesting estates according to the intention of the parties—was to secure and protect the titles under which persons entered into possession of their estates, and not to remit them back to other titles, which they had never thought of asserting.

But, independently of the objection arising from the lapse of time, the same reason operated against the remitter of William as of George. The former entered, not in assertion of his estate tail, but under the will of his great uncle, which took effect under the Statute of Uses, and under it became possessed of an estate for life only. Under that will, at common law, the trustees would have taken a legal title, and it became executed in William only by force of the statute. And the various subsequent acts done by him in the character of tenant for life, for a period of more than twenty years, until the recovery in 1814, were altogether inconsistent with the existence of a tenancy in tail. That recovery, and the mortgage in fee in 1816, affected a moiety only. Then, as to the other moiety, there was no claimant until 1818; and at that time all title under the estate tail had been barred by possession under the will of 1779, which possession is admitted on the face of the deed of 1818 to have been adverse. It is said, indeed, that according to the authority of *Doe d. Barrett v. Keen*, the entry of one co-parcener is the entry of both, and that William Billinghurst having been remitted to the estate tail in 1790, his possession from that period till 1818 enured to the benefit of his co-tenant in tail. But in *Doe d. Barrett v. Keen* no question of adverse possession arose; the entry is there expressly declared to have been made generally, and the judgment proceeds upon that ground. The question whether the possession of one co-tenant shall be deemed the possession of the other also, is a question of fact: *Earl of Essex v. Lord Temple* (a). In *Doe v. Prosser* (b), a possession for a period of thirty-six years, without account rendered, was held to be sufficient to warrant a jury in presuming an actual ouster. Here the Court is expressly authorized to draw any conclusion from the facts which it may think proper, in the same manner as a jury; and the

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(a) 1 Ld. Raym. 310.

(b) Cowp. 217.

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facts are abundantly sufficient to warrant the same presumption as in *Doe v. Prosser*. But the recent limitation act, 3 & 4 Will. 4, c. 27, s. 12, altogether disposes of this point. That section expressly enacts, that when one or more of several persons, entitled as co-parceners, joint tenants, or tenants in common, shall have been in possession of the whole estate, such possession shall not enure to the benefit of the others; and this clause has been held to have a retrospective operation: *Culley v. Doe d. Tayler-son* (a). It may possibly be contended, that William Billinghamurst, although he took and entered under the will, acquired a fee-simple in this moiety by adverse possession against the other issue in tail. But there is the most distinct evidence on the face of the case, that up to 1814 he treated himself as tenant for life; his possession, therefore, although adverse to the estate tail, was not adverse to, but in legal effect was the possession of, all who claimed under the will. As to this moiety, therefore, there has been an adverse possession against the lessors of plaintiff, under the will of George Woodroffe; as to the other moiety, there was an adverse possession from 1767 to 1790, which barred the issue in tail; or if not, William Billinghamurst could not be remitted, because he took under the will of George, which operated under the Statute of Uses.

Hodgson, in reply.—The base fee acquired by the innocent assurance of a tenant in tail, is not an estate *adverse to* the estate tail, but rather an estate in the nature of a *long lease*, to be fed out of the estate tail, and leaving in the issue in tail something of the same character as a reversion upon a long lease, and more than a mere right of entry. It cannot be said that there is in such a case any interruption of the seisin, as there would be by a feoffment. It would be a strange construction to say, that when a party

(a) 11 Ad. & E. 1008; 3 P. & D. 539.

has covenanted to stand seised to the use of another, that other can allege that the deed operated as a disseisin, or interruption of the seisin, of the very person who by his covenant was to retain the estate for the other's benefit. The possession under such an instrument is not adverse; as Lord *Holt* says in *Machell v. Clarke*, it does no prejudice to the issue, for they have only to enter to defeat it: it does not put them to their formedon, and their right to enter is in no wise barred. The statute of James, indeed, took away the *remedy by action*; but the *right* was not affected until the recent statute of 3 & 4 Will. 4, which declares that, for the future, when the remedy is gone, the right shall cease also. Therefore, although George Woodroffe, for the reasons already adverted to, was not remitted to his estate tail, that was for reasons merely personal to himself, and had no effect in keeping alive the title under the base fee against the remitter, further than his personal disqualification extended. The next issue might still be remitted. If a stranger had been in possession for twenty years, the only consequence would be that William would have been precluded from his adverse remedy by *action*; the *right* would nevertheless remain, and if he got into possession, he would be remitted *nolens volens*; for the doctrine of the law is, that remitter shall take place without any act of the party, for the benefit of those who claim under the same title. Here the possession up to 1779 was consistent with either title; the recovery suffered by George was void against the issue, and the settlement made by him might take effect out of his base fee, and had no greater effect against the issue than a long lease granted by him would have had. A possession under such circumstances, however long it continued, could never have operated to prevent the person next entitled from entering and setting aside the base fee. Where the right of *entry* has been turned by the operation of a fine, or some other tortious conveyance, into a right of *action*, which has accrued to

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the successors (as evidently was the case in *Tolson v. Kaye*), the case is different; but here the very person in possession was the only person who could bring an action; and not being able to sue himself, it necessarily follows that the fact of his bringing an action could have no effect upon the title. Such a possession was not at variance with the seisin under the estate tail, which might run on uninterruptedly, although the possession was justified by the covenant to stand seised, and the base fee created thereby.

It has been contended, however, that William also was not remitted, because he came in under the will of George, and which, it is alleged, took effect under the Statute of Uses, for that the will created an estate which, at common law, would have been a legal fee in the trustees, and became executed in William only by the operation of the statute. But it is submitted, that if the trustees took any estate, the sole object of the gift to them being to secure the payment of the annuity, they would take it only while the annuity subsisted, and that the devise to William operated altogether as a legal devise. Even if that were not its true construction, it has always been considered the better opinion, that a will in no case operates under the Statute of Uses; see 1 Sanders on Uses, 195; Butler's Notes to Co. Litt. 272. a. note viii; 1 Sugden on Powers, 172. The reasons generally assigned for this position are, first, that the Statute of Uses, having passed before the Statute of Wills, cannot be presumed to have referred to an instrument of which a party had at that time no power (without a custom) to make use; and secondly, that the main object of the Statute of Uses was to give the courts of law jurisdiction over equitable estates, which the complicated mode of settlement by use enabled parties to create; but this was unnecessary with respect to wills, because, in all cases where, before the Statute of Wills, they were operative by custom, the courts had been in the habit of regarding their language with indulgence,

and holding that the estates created by them did not require the strict formal terms of the common law, but that effect was rather to be given to the intention than to the mere words of the testator; and therefore, a gift to the use of a person by will was held to vest the estate in him. Again, the difficulty and inconvenience which would arise upon a gift to A. to the use of B., as to the vesting of the legal estate in the event of A.'s death in the testator's lifetime, has been assigned as another reason for holding such a devise to operate as a direct gift at common law. For these reasons, therefore, William Billingham was remittable; being so, he was remitted, and became tenant in tail with all its consequences. One consequence was, that he was in a situation to suffer a good recovery of his own moiety, and in 1814 he did so. If the effect of that recovery could have been to defeat the interest of any person who had a right against him by contract, as a purchaser for valuable consideration, a mortgagee, &c. it would undoubtedly have gone to confirm their assurances; but here there was no question of adverse title; the parties under the will of George took purely as volunteers; and William was under no obligation, because he had taken a benefit under the will, to confirm his sister's title under it. There was nothing which, in a court of law, so bound him as that the operation of his recovery must be to confirm that title. Therefore the express uses of the recovery-deed took effect, and the consequence is that the lessors of the plaintiff are entitled as to that moiety. And their title is equally complete as to the other moiety, because William, in contemplation of law, was in possession for the benefit of his coparceners, and was remitted so as to set up the interests of all who could claim under the estate tail. And the lapse of time from 1790 to 1818 makes no difference in the case, because there was nobody who could be prejudiced thereby. But even supposing that William, if he had been sued, might have availed himself of the lapse of time, yet nobody

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is *bound* to avail himself of the Statute of Limitations ; and the fact of Mrs. Maitland's concurrence being required to the recovery, clearly shews that he did not consider his possession adverse as against her. Since the recent statute, indeed, it must certainly be taken that the possession of a parcener is adverse against his coparcener ; but here the twenty years had run out before the passing of the statute, and the cases of *Doe d. Thompson v. Thompson (a)*, and *Nepean v. Doe d. Knight (b)*, are authorities to shew that it does not apply to antecedent transactions, which had been completed before its passing. William Woodroffe had the right, after the twenty years had elapsed, to abandon all the effect of his possession as being adverse to his coparceners, and he did so by suffering the recovery of a moiety only in 1814, and by his concurrence in the recovery of 1818. The recitals in the deeds mentioned in the case are merely unimportant statements of facts, binding nobody ; the only question is, was there anything in the previous deeds to bar the co-heirs from claiming under the estate tail, as they must be taken to have done by the recovery of 1818?

Cur. adv. vult.

The judgment of the Court was now pronounced by

ROLFE, B.—This was an action of ejectment, in which a verdict had been found for the lessors of the plaintiff, subject to a special case ; from which it appears that, by indentures of lease and release, dated 5th and 6th of January, 1710, George Woodroffe, being seised in fee of the lands in question, conveyed them to the use of himself for life, with remainder to his first and other sons in tail male, with remainder to the use of his brother, Robert Woodroffe, and Hester his wife, and the heirs of their bodies, with remainder to the use of the said Robert

(a) 6 Ad. & E. 721 ; 1 N. & P. 657.

(b) 2 M. & W. 894.

Woodroffe in fee. It may be as well to state at once, *Exch. of Pleas, 1842.* that we think it quite clear that by this settlement Robert and Hester became tenants in tail special, subject to the prior estate of George the settlor, and his issue. It was indeed attempted to be argued, though not very confidently, that inasmuch as the settlement purported to be made in pursuance of articles entered into previously to the marriage of Robert and Hester, therefore, according to the true construction of the settlement, Robert and Hester must be taken to be tenants for life only, with remainder to their issue in tail. Such, it was said, would be the construction put on the articles by a court of equity, and the same construction must, therefore, be given to the deed which purports to carry those articles into effect. But there is no weight in that argument. The articles were not produced, so that their exact construction cannot be ascertained; but even if it could have been rendered clear to demonstration that the settlement was not such as a court of equity would have directed, still that cannot affect its legal construction. It is certain that, at law, an estate to a man and his wife, and the heirs of their bodies, is an estate in tail special, whether that be or be not the estate which the court of equity would have directed. *Heneage v. Hunloke (a)*. This is a point which admits of no doubt. [His Lordship then stated the other facts of the case.] Under these circumstances the present ejectment had been brought on demises from the mortgagees, or persons deriving title under them, and from Mr. Maitland; and the question for our decision is, whether, under any of these demises, the plaintiff is entitled to recover.

In order to arrive at a correct conclusion on this point, the most satisfactory course will be to trace the title from

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(a) 2 Atk: 456.

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the settlement in 1710, by virtue of which Hester, the widow of Robert, became, in 1713, tenant in tail in possession, and to see how it has been from time to time affected by the different facts and documents relied on by the one party and the other. The first question will be, what was the effect of the deed-poll executed by Hester in 1730. We agree with the counsel for the lessors of the plaintiff, that we must consider that deed to have been in truth a covenant to stand seised to uses, and that its effect was to create a base fee in George, the son of Hester, liable to be defeated by the subsequent entry of the issue in tail. We do not think it necessary to state the argument on which we rely, as leading to this conclusion: it is enough to say, that the point was expressly decided in *Mackell v. Clarke*, and to Lord Holt's reasoning in that case we entirely subscribe.

George Woodroffe having thus acquired a base fee, survived Hester his mother, and continued seised until his death, which happened in 1779. There can be no question but that, on the death of George, the Rev. W. Billinghamurst, his nephew, and Hester Caverley, his sister, who had become heirs of the bodies of Robert and Hester, might have entered on the lands, and so defeated the title of the parties claiming under the will of George. This, however, they omitted to do; and on the death of George, the trustees named in his will for securing the payment of the annuity to the nephew for his life, entered, and continued in possession until the month of October, 1790, when William, the great nephew, who at that time attained his age of twenty-one years, entered on the whole of the property. Now it is to be observed, that the Rev. W. Billinghamurst, the nephew of George, died during the minority of his son William, the devisee, and, therefore, when William the devisee so entered in October, 1790, he was himself one of the co-heirs in tail of Robert

and Hester; and the question in the case mainly turns on the effect of this entry.

On the part of the lessors of the plaintiff, it is contended that the effect was to destroy the base fee altogether, and to set up the entail, as if the deed of 1735 had never been executed. On the part of the defendant, it was contended that it had no such effect; that whatever title George had under the entail, he had certainly a base fee under the deed of 1735, upon which his will operated, and that the entry of William, the great nephew, must be referred wholly to his title as devisee under that will; first, because such was plainly his meaning and intention, and secondly, because all right of entry in William as tenant in tail, had been barred by the Statute of Limitations.

With respect to the first point, it must, we think, be considered as clear, that when William entered in October 1790, he did so as claiming simply under the will, and in entire ignorance that he had any other title than as devisee. The facts seem clearly to shew, that from the year 1735, all parties supposed George to have acquired an absolute estate in fee-simple, and William must have intended to take possession by virtue of his title derived from the devise of that fee. The subsequent acts of William, up to the year 1814, all strongly tend to confirm this view of the case, and to shew that he originally took and afterwards retained possession, meaning to claim and hold the whole as tenant for life under the will of George, his great uncle. So far, therefore, as the intention of the party is material in shewing what was the legal effect of the entry, we think the defendant is clearly right.

But we are of opinion that the intention was wholly immaterial, and that the effect of the entry must be ascertained upon legal principles, irrespective of the motives or

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meaning of the party by whom the entry was made. Where a party having a right of entry enters, it is not competent to him to repudiate any rights he may possess, and to say he has entered as a trespasser, or by some other than his real title. As soon as he has entered, he is possessed, whether he will or no, by virtue of every title which he had in him, and which he could assert by entry. Littleton, in his 695th section, puts this case:—"If a man be disseised, and the disseisor let the land by deed-poll, or without deed, for a number of years, by which the disseisee entereth, this entry is a remitter to the disseisee. For in such case, where the entry of a man is congeable, and a lease is made to him, albeit that he claims by words in pais, that he hath estate by force of such lease, or saith openly that *he claimeth nothing in the land but by force of such lease*, yet this is a remitter to him, for that such disclaimer in pais is nothing to the purpose." The case put by Littleton is precisely similar to the present, assuming that William Billinghamurst the devisee had a right to enter as tenant in tail. In the case put by Littleton, the disseisee had by force of the lease a right of entry, but *his entry was also congeable*; that is, he had also a right of entry under an older and better title; namely, in respect of the prior estate and interest of which he had been disseised by the party granting him the lease. So here, William the devisee had a right to enter for an estate during his own life, to take effect out of the base fee. We assume, for the purpose of the present argument, that he had also a right to enter and defeat the base fee altogether, by virtue of his older and better title as tenant in tail. The entry in the case put by Littleton operated to restore the party entering to his older and better title, notwithstanding his disclaimer; and a similar result followed the entry of William the devisee in the present case, notwithstanding his acts indicating that he meant to take under the deed

and recovery of 1735, and not under the entail, all of which acts were, in the language of Littleton, "*nothing to the purpose.*"

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The correctness of this doctrine may, perhaps, be made more clear, by considering how the case would have been, if William the devisee had died without doing any act to bar the entail, and had left issue an only daughter. That daughter would have been inheritable under the entail, but would have had no claim under the will; and if a question as to the right to the estate had arisen between her and the present defendant, all that she could have been called on to shew would have been, the creation of the estate tail, its continuance down to the period when her father entered, in 1790, and his entry and possession up to his death. Could it possibly have been an answer to such a case to shew, that when her father entered, he disclaimed by words or by his conduct any right to the entail? To any such defence the daughter would have replied, that she claimed *per formam doni*, and that her right was not barred by the act of any of her ancestors, other than a fine or recovery. And in such a contest she must have been successful.

For these reasons we are of opinion, that, assuming William Billinghamurst to have had a right to enter in 1790 as tenant in tail, his entry in fact at that time made him tenant in tail in possession, whether he intended it to have such an operation or not.

But it was contended by the *Solicitor-General*, on behalf of the defendant, secondly, that William Billinghamurst had no right of entry in 1790 in respect of the estate tail, for that the right which he, or his father, through whom he claimed, once had, was before that time barred by the Statute of Limitations. This question cannot arise, if, as was contended by Mr. *Hodgson*, the Statute of Limitations applies only to those cases where the contest is, whether a

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party can assert a right by entry, and not where, as in this case, the party has lawfully entered, and the only point is as to the legal effect of the entry. We will however assume that the statute is applicable to the one case as well as to the other; and then the argument of the *Solicitor-General*, as to this branch of it, will depend on the question, whether, in calculating the twenty years within which the entry must be made, we are to calculate from 1767, when Hester the mother died, or from 1779, when George the testator died; if from the former, the argument of the *Solicitor-General* is good; if from the latter, it is bad.

We are all clearly of opinion, that it is from the year 1779, and not from the year 1767, that the calculation must be made. The language of the Statute of Limitations, 21 Jac. 1, c. 16, is, "that no person shall make an entry into any lands, &c. but within twenty years next after his right or title which shall hereafter first descend or accrue to the same." The argument of the *Solicitor-General* was, that the right or title of entry, in the present case, first descended or accrued on the death of Hester, the tenant in tail, in 1767; but this is not so. George, by the recovery of 1735, estopped himself from ever setting up the estate tail. That recovery, though void as against the issue in tail, was binding on him; he could never afterwards make an entry, so as to assert a title inconsistent with the recovery; and consequently he did not, by the death of his mother, acquire any right of entry whatever. No right or title of entry accrued to any person, enabling such person to defeat the base fee, until the death of George in 1779, when such right first accrued to the Rev. W. Billinghamurst and Ann Walker, the then tenants in tail. If, indeed, George had not suffered the recovery in 1735, nor done any other act operating against him as an estoppel, then the argument of the *Solicitor-General*, that the right or title of

entry first descended or accrued in 1767, would have been well founded; but in that case the right of entry accruing to George (as is plain both on principle and authority) would, by the doctrine of remitter, have converted his defeasible seisin under the deed poll of 1735, into an indefeasible seisin, as tenant in tail under the original settlement; for where a party, in possession of land under a defeasible title, acquires a right to assert an older and better title, not by *action*, but by *entry*, then neither the circumstance of his having acquired the possession of his own voluntary act, nor of his having come in under a conveyance operating by the Statute of Uses, will prevent the application of the doctrine of remitter. Littleton, 693, and two preceding sections; *Anonymous*, 3 Leon. 93. If, therefore, George had not been affected by an estoppel, then, on the death of his mother, he would have become tenant in tail in possession; and on his death in 1779, a new right of entry would have accrued to the issue in tail. In every view of the case, therefore, it is from the latter date, and not from the death of Hester in 1767, that the period of twenty years allowed by the statute is to be calculated.

The right of entry having thus first accrued in 1776, and entry having been duly made eleven years afterwards by William Woodroffe, one of the co-heirs in tail, in 1790, on the entirety of the estate, and he having continued seised of the entirety until his decease in 1824, it becomes unnecessary to consider what was the precise legal effect of his entry, so far as relates to the moiety of Mrs. Walker, the other co-heir in tail. It certainly either had the effect of restoring her seisin, so as to make her, and after her death her daughter, Mrs. Maitland, tenant in tail in possession, as co-parceners with William Woodroffe, formerly Billinghurst, by whom the entry was made; or else his entry, with the subsequent continued possession, was, as to that

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moiety, an actual ouster of the other co-heir, so as to give him a title against her by adverse possession, making him, as to this moiety, tenant in fee-simple by wrong. In either case, the estate was effectually conveyed to the mortgagees by the deeds and assurances of 1816 and 1818, in which Mr. Woodroffe and Mr. and Mrs. Maitland all concurred, so as to pass their rights, whatever they were, to the mortgagees.

For the foregoing reasons, we are of opinion that the lessors of the plaintiff, deriving title from William Woodroffe and Mr. and Mrs. Maitland, and the mortgagees, are entitled to judgment.

Judgment for the plaintiff.

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Nov. 16.

EDEN v. TURTLE.

ASSUMPSIT on a bill of exchange, drawn by one J. W. Harrison on and accepted by the defendant, and by the said J. W. Harrison indorsed to the plaintiff. The defendant pleaded, that before and at the time of accepting the bill in question, he the defendant was indebted to one Julia Mainwaring in the sum of money in the bill mentioned, and thereupon the said J. W. Harrison drew the said bill, and the defendant accepted the same, for a special purpose only, that is to say, that, after the acceptance of the said bill by the defendant, and after his delivery thereof to the said J. W. Harrison, and before the same should become due and payable, he should hold the same for the sole use and benefit of the defendant, and should get the same discounted for him, and that upon such discounting he should deliver and pay the proceeds of the bill to the said Julia Mainwaring, in satisfaction and discharge of the said debt so due from the defendant to her, and not otherwise: and the defendant further saith, that thereupon, at the request of the said J. W. Harrison, and before the said bill became and was due and payable, he then accepted the said bill for the same special purpose, and not otherwise; and that at the like request of the said J. W. Harrison, he the defendant delivered the same to him, who then received, and from thence until the delivery thereof to the banker hereinafter mentioned held the same for such special purpose as last aforesaid, and for the sole use and benefit of the defendant, and not otherwise; and the defendant further saith, that the last-mentioned acceptance, and the said acceptance in the declaration mentioned, are one and the same acceptance, and that, except as aforesaid, there never was any value or consideration whatever given for the acceptance of the said bill by the defendant, or for the payment by him of the amount, &c.; and the defendant further saith, that afterwards, and before

Assumpsit by the indorsee against the acceptor of a bill of exchange. Plea, that being indebted to J. M., he the defendant accepted the bill and delivered it to the drawer for a special purpose, viz. that it might be discounted by him, and the proceeds paid to J. M. in satisfaction of the debt: the plea then averred that the drawer held the bill for such special purpose, and for the sole use and benefit of the defendant. Replication, that the drawer did not hold the bill for the said special purpose, and for the sole use and benefit of the defendant: —*Held*, that the traverse was not too large, as it did not compel the defendant to prove more than he would otherwise be bound to prove in support of his plea.

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the same bill became due, the said J. W. Harrison transferred the same bill to a certain banker with whom he then had dealings and transactions in the way of his business of a banker, who then received the said bill, and gave credit to the said J. W. Harrison only for the amount thereof: and the defendant avers, that the said last-mentioned transfer was made against good faith, and contrary to the said purpose for which the said J. W. Harrison so received and held the said bill as aforesaid, and without the knowledge and consent of the defendant.—The plea then went on to aver a presentment of the bill to the defendant when at maturity, and its dishonour by him, whereupon the said banker, as holder of the bill, returned and redelivered it to the said J. W. Harrison, and wholly abandoned all his right thereto, and all his claim and demand in respect thereof as such transferee; and that the said J. W. Harrison then received and accepted the same bill, and assented to such abandonment, and continued to hold the said bill from that time to the time of the delivery thereof to the plaintiff as thereafter mentioned, without any default of the defendant. It then stated, that long afterwards, to wit, on the 1st May, 1842, in further violation of good faith, contrary to the said purpose for which he received the said bill, and without the defendant's default, knowledge, or consent, or that of the said Julia Mainwaring, J. W. Harrison indorsed and delivered the same to the plaintiff, who then received the said bill from the said J. W. Harrison for the first time, and upon other and different terms, and contrary to the said special purpose, and in breach and violation thereof, to wit, under colour of a debt due to him from the said J. W. Harrison, and with notice that the bill was overdue, &c.—Verification.

Replication, that the said bill was not made or drawn by the said J. W. Harrison upon or accepted by the defendant, nor did the defendant deliver the same to the said J. W. Harrison, nor did the said J. W. Harrison receive or hold the same, for the said special purpose in the plea mentioned,

and for the sole use and benefit of the said defendant, in manner and form as in the said plea alleged.

To this replication the defendant demurred specially, on the ground that the traverse in the replication was bad, for being in the conjunctive instead of the disjunctive. Joinder in demurrer.

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Peacock, in support of the demurrer.—The traverse is too large, being in the conjunctive instead of the disjunctive. The plaintiff ought not to have put in issue that the bill was given for a special purpose, *and* for the sole use and benefit of the defendant, as by that mode of pleading he puts the defendant to prove more than he would otherwise be compelled to prove. The replication ought to have traversed those allegations in the disjunctive. In *Stephen on Pleading*, 274 (a), it is said, “A traverse may be too large by being taken in the *conjunctive* instead of the *disjunctive*, where it is not material that the allegation traversed should be proved conjunctively,” for which the author cites *Goram v. Sweeting* (b). In *Moore v. Boulcott* (c), where the plea was that the bill was for work done at law *and* in equity, a replication that the bill was not for work and labour at law *and* in equity, was held to be ill. So, in *Stubbs v. Lainson* (d), where the declaration alleged that the sheriff seized and took in execution *and levied* certain goods, a plea that the defendant did not seize *and levy* was held bad, as the traverse ought to have been in the disjunctive. Here the plea is, that the bill was drawn and accepted for a special purpose, and that Harrison held it for such special purpose, *and* for the sole use and benefit of the defendant; and the replication is, that he did not hold the bill for the special purpose, *and* for the sole use and benefit of the defendant, which clearly brings it within the authorities cited.

(a) 4th edit.

(c) 1 Bing. N. C. 323; 1 Scott, 123.

(b) 2 Saund. 205.

(d) 1 M. & W. 728.

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Butt, contrà.—The traverse is in fact a traverse of the special purpose only, and compels the defendant to prove no more than he would otherwise be bound to prove in order to sustain the defence alleged in the plea. The payment of the defendant's debt to Julia Mainwaring, which was the special purpose, was in fact for the sole use and benefit of the defendant. The cases cited are distinguishable. In *Stubbs v. Lainson*, the traverse taken by the defendant would have compelled the plaintiff to prove not only the seizure, but also the levy.

Peacock replied.

LORD ABINGER, C. B.—I am of opinion that the replication in this case is sufficient. When a pleading, by traversing facts alleged in the conjunctive, imposes on the opposite party the onus of proving more than a traverse properly taken in the disjunctive, it is bad; but the present replication only puts the defendant to prove the same facts, and no more, which he otherwise would be bound substantially to do in order to support his plea. If the general replication *de injuriâ* would not have put in issue, or compelled the defendant to prove, all the special purpose alleged in this plea, this replication would be bad; but, as it appears to me, the substantive allegation in the plea is, that the bill was delivered to the drawer to be discounted for the use of the defendant, and for no other purpose whatever.

PARKE, B.—I also am of opinion that this replication is good, as being a mere traverse of an essential averment in the plea; which, after alleging that the bill in question was accepted by the defendant and delivered to Harrison for a special purpose, namely, to hold for the sole use and benefit of the defendant, and that the same might be discounted for his benefit &c., goes on to say, that Harrison, after the delivery thereof to him, held the same for such

special purpose as aforesaid, and for the sole use and benefit of the defendant; and the traverse only follows the terms of the plea, and denies that the bill was delivered to Harrison, or held by him, for the special purpose mentioned in the plea. I quite agree, that if the effect of this replication were to compel the defendant to prove more than he otherwise would have been bound to do in order to support his plea, it would be bad; and the whole question comes shortly to this—would this plea be supported by proof that the bill had been delivered to Harrison for his own use, or for the use of the defendant generally, or to pay it over to another person, or for any other purpose than that of getting it discounted, as alleged in the plea? I think not; for the plea puts forward two facts as necessary parts of the defendant's case; namely, first, that the bill was delivered over to Harrison; and secondly, that it was so delivered for the special purpose thereafter mentioned; both of which must, of course, be proved in order to make out the plea. If, for instance, the proof were simply that the bill had been delivered to Harrison to hold as a depository, for no particular purpose, or such like, it would not be sufficient; the defendant would be bound to go further, and shew that it was with the view of being discounted for the purpose stated on the record.

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GURNEY, B., concurred.

ROLFE, B.—The joint effect of the plea and replication in this case is to put in issue the special purpose alleged in the former, namely, that the bill was delivered to Harrison by the defendant to be discounted for him, and so was held by Harrison for the use and benefit of the defendant.

Judgment for the plaintiff.

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Nov. 24.

JACKSON v. UTTING and Others.

Where, in an action against four defendants, issue had been joined against three of them, and the fourth had been discharged under the Insolvent Debtors' Act since the commencement of the action; the Court discharged with costs a rule for judgment as in case of a nonsuit, on the ground that no complete issue had been joined.

THIS was a rule for judgment as in case of a nonsuit. It was an action against four defendants, and it appeared from the affidavits that issue was joined, as to three of them, on the 5th February; and that the fourth had, since the commencement of the action, filed his petition and schedule in the Insolvent Debtors' Court, and by an order of that Court had been discharged from the debt for which this action was brought.

Martin shewed cause, and contended that the motion could not be entertained until issue had been joined against all the defendants.

Humfrey appeared in support of the rule.

PARKE, B.—You must shew a complete issue joined that might be tried, which is not shewn to be the case as regards all the defendants.

PER CURIAM,

Rule discharged, with costs.

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WILLSON v. CAREY and CUNNINGTON.

DEBT.—The declaration stated, that after the passing of the 19 Geo. 3, c. 56, the plaintiff, being employed by the defendants as an auctioneer, to sell by public auction certain lands, and amongst them lot 4, did put up for sale by public auction, in a certain part of Great Britain, not within the limits of the chief office of excise in London, to wit, at Spalding in the county of Lincoln, lot 4, subject to the condition of sale, that the highest bidder should be the purchaser; that J. Hames was the highest bidder, and declared by the plaintiff to be the purchaser, for the price of £3,100, whereby auction duty to the amount of 94*l.* 18*s.* 9*d.* became payable to Her Majesty, and was a charge upon the plaintiff as such auctioneer, and was paid by him to the collector of excise. Breach, non-payment by the defendants of the said sum of 94*l.* 18*s.* 9*d.*

Plea, by the defendant Carey, that it was one of the conditions of the said sale, that the purchaser should, immediately after the sale, pay the auction duty upon the pur-

Nov. 16.
Debt.—The declaration alleged, that the plaintiff, being employed by the defendants to sell certain lands by auction, put up the same for sale, subject to a condition that the highest bidder should be the purchaser: that one H. was the highest bidder, and declared by the plaintiff to be the purchaser, whereby auction duty to the amount of 94*l.* 18*s.* 9*d.* became payable by the plaintiff, and was paid by him: breach, in non-payment of that sum by the defendants.

—Plea, by one of the defendants, that it was a conditional sale, that the purchaser should after the sale pay the auction duty; that upon exposure to sale, and H. being the highest bidder, payment of the duty was then demanded of him by the plaintiff, and refused by him, whereby his bidding became null and void.—Plea, by the other defendant, that the plaintiff at the time of the sale demanded payment of the duty from H., who refused to pay, and did not at the time of the sale or at any time since pay the same, whereupon the defendants then declared the said bidding and sale to be null and void, and the same became null and void.—Replication, that before H. became a bidder, it was collusively agreed between him and the latter defendant, that H. should bid, not with a view of completing the purchase, but merely to outbid another bidder, and that H. did so bid; that the plaintiff at the time of the auction had no notice either of the said agreement or of the intent of H. becoming a bidder; that the plaintiff at the said auction, and whilst H. was the highest bidder, closed the biddings, and H. then became the highest bidder, and was declared to be the purchaser; that H. refused to pay the auction duty; and that before his bidding no notice was given to the plaintiff by H. or by the defendants of H.'s being appointed and having agreed to bid at the sale for the use and behoof of the defendants. *Held*, first, that the declaration was good, and that the replication was not a departure from it.

Secondly, that the former plea was bad, as it did not shew that the vendors had exercised their option of declaring the bidding to be null and void.

Thirdly, that the latter plea was bad, as it did not shew that the vendors had, at the time and place of auction, exercised their option of declaring the bidding to be void, or had notified the same to the plaintiff.

Fourthly, that the 19 Geo. 3, c. 56, has not repealed the 7th sect. of 17 Geo. 3, c. 50.

Where defendants plead separately pleas which are demurred to, the pleas and demurrers being substantially the same, each defendant is not entitled to appear by separate counsel on the argument of the demurrer.

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chase-money; that, upon the said exposure to sale, and upon Hames being the highest bidder, payment of such auction duty was then demanded by the plaintiff from Hames, who then refused to pay the same, whereby his bidding then became null and void to all intents and purposes, by virtue of the statute in such case made and provided, &c.

Plea, by the defendant Cunningham, that the defendants, as sellers, and the plaintiff, as auctioneer, made it a condition of sale, that, according to the statute 17 Geo. 3, c. 50, the duty should be paid by the purchaser, over and above the price bidden at the sale; that the plaintiff, at the time of the sale to Hames, demanded payment of the auction duty from Hames, who neglected and refused to pay the same, and did not at the time of the sale, nor at any time since, pay the same, according to the true intent of the condition of sale, and of the act of Parliament, whereupon the defendants, according to the true intent of the statute, (17 Geo. 3, c. 5, s. 8), then declared the bidding and sale to be null and void, and the bidding and sale then became null and void, by virtue of the said act.

Replication to each plea, that before Hames became a bidder, it was collusively agreed between him and Cunningham, that Hames should bid £3,100, so as to appear as a real *bonâ fide* bidder, not with any view of completing the purchase in case he should be the highest bidder, or of paying the auction duty, but merely with the intent of out-bidding a certain bidder, and that Hames did, in pursuance of the said agreement, bid the sum of £3,100; that the plaintiff, at the time of the action, had no notice either of the said agreement, or of the intent with which Hames became such bidder; that the plaintiff, at the said auction, and whilst Hames was the highest bidder, closed the said biddings, and thereupon Hames became the highest bidder, and was declared to be the purchaser; that Hames refused to pay the auction duty, in pursuance of the said agreement; that before Hames's bidding, no notice was given to

the plaintiff by Hames or the defendants, of Hames being appointed and having agreed to bid at the sale for the use and behoof of the defendants.

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Special demurrer, assigning, amongst other causes, that the plaintiff had not stated that Carey was a party to, or authorized or concurred in, the said collusive agreement between Hames and Cunnington, and that the said collusive agreement did not render the defendants liable to pay the auction duty.

N. R. Clarke, in support of the demurrer by Cunnington.—The replication is bad, for it omits to state that Carey had any knowledge of the collusive agreement between Cunnington and Hames. The agreement is stated to have been made with Cunnington only, and the act of one vendor is not the act of both. At all events, if it is meant to be contended that the act of one is the act of both, it should have been so pleaded. Com. Dig. 'Pleader,' (C) 37, *Monnington v. William* (a). Whatever was done by Cunnington was, so far as appears, without the authority of Carey, and Cunnington had no authority to bind Carey by this collusive agreement. He was not the owner of the estate; he and Carey together formed but one owner in contemplation of law. The auctioneer's power to make it a condition that the purchaser should pay the auction duty, was to protect the vendors from mere men of straw bidding at the sale. The act of Parliament did not intend that any duty should be paid where the money was not paid in. Here no auction duty attached, and therefore, notwithstanding the collusive agreement entered into by Cunnington, the plaintiff ought not to have paid it, and consequently he is not entitled to recover. Cunnington and Carey together had power to act jointly, and by so doing might declare the sale void. And the plea accordingly states,

(a) 1 Vent. 109; 2 Saund. 97 b, n. 2.

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that pursuant to the intent of the statute 17 Geo. 3, c. 50, s. 8, they the defendants did declare the bidding and sale to be null and void, by virtue of the act. There cannot be a doubt that it is competent to one of several joint owners of an estate to become a purchaser of the whole, and if one chooses to become such purchaser, why should he not be allowed to employ a person to bid for him? and in that case, as he would be bound by that contract, it is admitted that he would be liable to duty. The one who dissented from the authority of Hames to bid may have a right to insist on the contract being performed. Payment of the duty was demanded and refused, and the defendants were then at liberty to declare the sale null and void, which they accordingly did. No auction duty then was payable.

Martin appeared in support of Carey's demurrer:—but

W. H. Watson, for the plaintiff, objected that two counsel had no right to be heard on the same ground, in support of two defendants whose pleas and demurrers were substantially the same, and their interests identical. He cited *Brooke v. Turner* (a), where the Court under similar circumstances had declined to hear more than one counsel, but permitted the second counsel merely to mention the names of cases.

The Court allowed *Martin* to proceed, but at the close of the case Lord *Abinger*, C. B., expressed a hope that the indulgence granted by the Court would not be drawn into a precedent; as the practice of hearing more counsel than one on the same point would be productive of expense and loss of time.

Martin.—The declaration is bad, and cannot be supported, for it is founded entirely on the liability under

(a) 2 Bing. N. C. 432; 2 Scott, 622.

the statute, and not on any promise by the defendants, and no right of action accrues to an auctioneer for auction duties payable on the sale of land, but only on the sale of goods. This is evident from the language of the 19 Geo. 3, c. 56, which was passed to regulate the duties imposed by the 17 Geo. 3, c. 50. By section 7 of the 19 Geo. 3, c. 56, every person acting as an auctioneer is required to give an "account in writing of the total amount of the money bid at each sale, and of the several *articles, lots, or parcels* which shall have been there sold, and the price of each and every such *article, lot, or parcel*." And it is enacted, that the auctioneer shall recover the duties from the persons "on whose account such *goods* shall be so sold." That shews that the section applies to the sale of goods only, and it is only in that case that the auctioneer is authorized to bring an action of debt. In the case of lands, no duty is imposed by the act upon the employer to pay the auctioneer, and therefore there is no good cause of action founded on the statute. Whether or not there is an implied promise to pay the amount which he is called upon to pay for auction duty, is another matter. Again, the declaration is bad on the ground that the act gives no authority to an auctioneer residing out of the limits of the chief excise office to recover the duty. The 8th section only applies to auctioneers who reside out of those limits; and it provides, that every person acting as an auctioneer not within the limits of the chief office of excise, shall give security that he will, within six weeks after every sale by auction, deliver an account in the same manner as is thereinbefore required to be delivered by persons selling within the limits of the chief office, and shall make payment of all sums of money due and payable to his Majesty on account of every sale by auction within such six weeks respectively; and all the powers, directions, penalties, and forfeitures thereinbefore prescribed for the better levying, securing, or accounting for the said rates

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or duties within the limits of the chief office, shall be observed in all other parts of Great Britain, as if the same were again re-enacted. There is nothing there which gives this right of action. It is not for a penalty or a forfeiture, and the section only applies to the penalties due to the crown. The declaration is therefore defective.

Secondly, the plea by Carey is also good. The duty is imposed in cases where a sale has taken place, not where there has been no sale. As far as appears upon the face of the declaration, there was a sale to Hames; but the plea states that the vendors, on nonpayment of the duties by the buyer pursuant to the conditions of sale, declared the sale to be void under 17 Geo. 3, c. 50, s. 8, and consequently the duties did not attach. Therefore, if the plaintiff paid the auction duty, he paid it in his own wrong, and cannot be entitled to recover it from the defendants.

Thirdly, the replication is clearly bad, on the ground that it is a departure from the declaration. It is stated in the declaration as a complete sale to Hames, whereas the replication shews, that although Hames appeared to be a purchaser, no valid sale ever took place.

W. H. Watson, for the plaintiff.—The auction duty attached upon the plaintiff on the sale to Hames, and having been paid by him, may be recovered from the parties who employed him. This is clear from the 6th and 7th sections of 19 Geo. 3, c. 56; the former of which enacts, that the duties shall be a charge upon every auctioneer “from and after the knocking down of the hammer or other closing of the bidding.” Whether the seller in the present case can avoid the sale under the 17 Geo. 3, c. 50, s. 8, depends in the first place on the question whether that section has not been repealed by the statute 19 Geo. 3, c. 56. [*Parke*, B. —The first section of the latter act, which declares that the powers, rules, &c. for granting licenses shall cease and determine, does not repeal the former statute in toto.] At

all events, the defendants, who were instrumental in causing a fictitious sale to take place, cannot take advantage of their own wrong to rescind it. In *Malins v. Freeman* (a), it was held that a purchaser cannot rescind his own contract at an auction, on the ground that he has refused to pay the auction duty pursuant to the conditions of sale, notwithstanding the statute 17 Geo. 3, c. 50, which enacts, that in case of such refusal, the bidding shall be null and void to all intents and purposes. That was on the ground that the sale is not absolutely void, but voidable only at the option of the seller. The vendors might therefore, in this case, have considered Hames as a good purchaser. At least the plea is bad, for, as the duty attached upon the auctioneer on the knocking down of the hammer, the plea ought to have shewn the time when the sale was declared void by the sellers; whereas it is consistent with this plea that the sale was not declared void until long after the duty attached, and the plaintiff had been called upon to pay it. The declaration states, that the duty had become payable, and had become a charge upon the plaintiff, and that is not denied by the plea. The plea is consistent with this, that the duty had attached, and had been paid, and that after that the vendors, or vendee, refused to complete the purchase.

Admitting, however, that this was a bonâ fide purchase by the defendants of their own estate, the 12th section of the 19 Geo. 3, c. 56, enacts, not that the auctioneer in such a case shall not pay the duty to the crown, but that the owners are to have an allowance of the duties from the commissioners of excise, provided that notice be given to the auctioneer before the bidding, both by the owner and the person appointed to bid, of the latter being appointed by the former, and having agreed accordingly to bid for the use and behoof of the seller. That section is re-enacted by 42 Geo. 3, c. 93, s. 1. In *Capp v. Topham* (b), an auc-

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(a) 4 Bing. N. C. 395; 6 Scott, 187.

(b) 6 East, 392.

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tioneer was employed to sell an estate, the lowest price of which was fixed by the owner, and written down on a piece of paper, which was put under a candlestick at the time of sale, with the privity of the auctioneer, but not signed by the owner, nor any notice in writing given to the auctioneer of the price so set down, nor had the auctioneer given the previous notice of the sale to the collector of the duty, as required by the acts of the 19 Geo. 3, c. 56, and 28 Geo. 3, c. 37; but being asked, at the sale, whether he had taken the proper precautions to avoid the duty in case there was no sale, he said that it was his mode to fix a price under the candlestick, and if the bidding did not come up to that price it was no sale or duty; and it was held, that the duty having attached, though there was no sale, for want of taking the precautions required of the owner by the statutes under such circumstances, and the auctioneer having been sued for the duty on his bond to the crown, and compelled to pay it, he could not recover it over against the owner, he having warranted that proper precautions had been taken to prevent the duty attaching in the event, though both parties were mistaken in the law. So, in *Cruso v. Crisp* (a), it was held that, in the case of *dumb biddings*, the duty attached; and in *Jones v. Nanny* (b), it seems to have been considered that the auction duty may attach though the sale be imperfect, and the vendee never become a purchaser. The plea ought to have shewn that the duty did not attach, which it has not done; but even if it were otherwise, the replication is good, and shews that the purchase by Hames was such that the duty attached upon the plaintiff.

LORD ABINGER, C. B.—I am of opinion that the plaintiff is entitled to the judgment of the Court. This was a case in which the auctioneer was bound to pay the auction duty,

(a) 3 East, 337.

(b) M'Clel. 25; 13 Price, 76.

as it attached upon him at the time of the auction; and the statute makes him liable to pay it even before a complete sale has taken place. Here the declaration states that Hames had previously become the purchaser, although not by a complete contract, but only so far as to make the duty attach. Hames had agreed to become the purchaser at a sale where he was declared the highest bidder; and the declaration is sufficient, as it states that he was declared to be the purchaser. The auction duty then having attached upon the plaintiff, how is he to get rid of it? The 11th section of the statute provides, that where the sale is void owing to a defective title, the auctioneer may complain to the commissioners of excise or the justices, and they may relieve him from his over payments, and the same allowance of duty is to be made to the owner of the estate, who becomes the purchaser of it by himself or his agent. But although in the above cases the duty may be recovered back, still the auctioneer is liable in the first instance to pay it. The auctioneer is bound to give security that he will, before the commencement of any sale by auction, give in a list of the articles, lots, and things to be sold; and he is also bound to pay the duty, which attaches at the time of sale. In what way, under the present state of facts, could the auctioneer protect himself from payment of the duty? A lot of land was put up to sale, and at the close of the biddings a certain party was declared the purchaser. If the auctioneer were to allege to the officers of excise that the vendor had empowered a person to bid for him, the answer would be that he, the auctioneer, had no notice of that party being so employed, and that he must therefore pay the duty. The auctioneer was bound, therefore, to pay the duty. But then it is said by the defendants, that the plaintiff cannot recover, because they declared the sale to be null and void, on the ground that the purchaser refused payment of the duty. To this the plaintiff replies, that the sale was not declared null and void on

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this account, but because it was collusive; and this replication is not a departure from the declaration, but on the contrary supports it, as it shews that Hames was a purchaser, and that after he became such the sale was made null and void. There is no weight in Mr. *Martin's* objection, that the statute 19 Geo. 3, c. 56, does not apply to sales of land. It is general in its terms, for it speaks of "lots, articles, and parcels," and applies to all sales, without being controlled by the word "goods," which occurs towards the end of the clause.

PARKE, B.—I think the declaration is good, and the plea bad. The first point made by the defendant is, that the plaintiff's right of action is founded upon the statute, and that in the present case he has no remedy. Now that question depends upon the 6th, 7th, and 8th sections of the 19 Geo. 3, c. 56. It is said that the provisions of that statute give an auctioneer a right to recover the auction duty in respect of the sale of goods only; but the answer to that is, that the remedy is given generally against the party who employs such auctioneer; and that in this case the defendants employed the plaintiff. It is then said, that the right of the auctioneer to recover the duty is confined to those auctioneers who reside within the limits of the chief excise office. But that is not the case, for, by the 8th section, all the powers, directions, and penalties thereinbefore prescribed are directed to be observed in other parts of Great Britain also. The 6th section makes the auctioneer, upon every sale by auction, liable to the duties upon the knocking down of the hammer; the 7th section enables him to recompense himself by action, and it would be unjust if this power did not extend to the case of all persons who might employ him to sell by auction. But then it is objected, that the declaration does not disclose such a sale as makes the defendants liable. I cannot assent to that. The declaration states, that the plaintiff

put up certain lands for sale, subject to certain conditions; that on the exposure for sale, Hames became the highest bidder; and that at the close of the biddings he was declared to be the purchaser for a certain price. Those being the facts, the plaintiff became liable to the payment of the auction duty, and may recover it from the defendants. The plaintiff's remedy is under the statute, and as there is no special contract stated here, I am not sure that he has any remedy, unless he can recover under the act.

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The next question is, whether the pleas afford any answer on general demurrer. I am of opinion that they do not. Carey's plea states, that on Hames becoming the highest bidder, the auction duty was demanded by the plaintiff, and was refused by Hames; whereby the bidding became null and void. But that is not a correct construction of the statute, for the bidding is voidable only, and can be made void only by the vendor's exercising his option to that effect, which it is not stated that he did in this case. Neither does the plea of Cunningham contain sufficient allegations to make the sale altogether void. If the 17 Geo. 3, c. 50, s. 8, was framed with a view to protect the auctioneer, the purchaser should exercise his option of avoiding the sale at the time and place of auction. But in this plea there is no averment which, if traversed, would bind the defendants to shew that at the time and place of sale they declared to the plaintiff that the sale was void. There is, indeed, an averment that Hames did not at the time of the sale, nor at any time since, pay the duty; but there is nothing to shew that the defendants exercised their option of declaring the sale void, and notified the same to the auctioneer.

Whether the replication is good, need not be decided. It would have been necessary to determine that question if the plea had been good, and the allegation as to time and place had been properly made. I think, however, that the replication does entitle the plaintiff to

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his action, and that it is not a departure from the declaration. The declaration merely states that the auctioneer became liable to pay the auction duty; the plea then alleges, that, on the buyer not paying the duty, the sellers declared the sale to be void: to this the replication answers, that that defence is not available, because one of the two sellers acted collusively, and there was no intention that Hames should become the purchaser. It is the case of a person employed by the two owners of the property to bid for them, without any notice of that fact having been communicated to the plaintiff. It is enough, however, to say that the plea is bad, and that therefore the plaintiff is entitled to our judgment.

GURNEY, B., concurred.

ROLFE, B.—If, according to Mr. *Martin's* argument, we were to hold that the right of suing the employer, given to the auctioneer under the 7th section of the 19 Geo. 3, c. 56, does not apply to real property, this incongruity would follow, that the legislature in that case would have given different remedies in the case of real and of personal property; for if the 7th section does not apply to real property, and the 8th does not extend to country auctioneers the right of suing their employers, there would be this extraordinary incongruity, that, as regards the sale of personal property in London, the vendors would be primarily and immediately liable to the auctioneer, whilst, with respect to the sale of real property in London, and all sales in the country, the auctioneer would be ultimately and alone liable to pay the duty: but it is an absurdity to suppose that an auctioneer was intended by the legislature to pay duty in one case, and not in the other. The meaning of the two sections, in spite of the use of the words “goods” in the 7th, is, that in the case both of London and country auctioneers, the party employing them is bound to pay them the duty.

Judgment for the plaintiff.

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ROBERTS v. ELSWORTH.

Nov. 18.

THE declaration in this case contained three counts: the first on a promissory note for £50; the second on another to the like amount; and the third for £100 on an account stated.

The particulars of demand were as follows:—"This action is brought to recover the sum of £50, being the amount of the promissory note in the first count of the declaration mentioned, together with interest thereon from 11th February, 1842; and also the further sum of £50, the amount of the promissory note in the second count of the declaration mentioned, together with interest thereon from 11th July, 1842. Above are the particulars of the plaintiff's demand, for the recovery whereof he will avail himself of the whole or any part of the declaration."

At the trial before Lord *Abinger*, C. B., at the sittings in London after Trinity term, the promissory notes were not produced, owing to the absence of the attesting witness, nor was any evidence given of their existence; but the attorney for the plaintiff was called to prove the account stated, and he said that in February, 1842, he met the defendant and said to him, "Your uncle (the plaintiff) wants the £100 you owe him;" to which the defendant replied, "I must contrive it for him." The witness then said, he would see him next fair day; and on that occasion asked, had he got the money? to which the defendant replied, he had not. It was then objected by *Erle*, on the part of the defendant, that this was no evidence of an account stated with reference to the promissory notes mentioned in the bill of particulars. Lord *Abinger*, how-

Declaration in assumpsit contained three counts; the first, on a promissory note for 50*l.*; the second, on another note to the like amount; and the third for 100*l.* on an account stated. The particulars of demand were as follows: "This action is brought to recover the sum of 50*l.*, being the amount of the promissory note in the first count of the declaration mentioned, and also the further sum of 50*l.*, the amount of the promissory note in the second count mentioned. Above are the particulars of the plaintiff's demand, for the recovery whereof he will avail himself of the whole or any part of the declaration." No evidence of the promissory notes was given at the trial, but a conversation with the defendant was proved, in

which he acknowledged he owed the plaintiff 100*l.*:—*Held*, that the particulars were insufficient to enable the plaintiff to recover, and that, in order to do so, he was bound to prove an admission or an account stated with reference to the promissory notes.

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ever, left the case to the jury, who found for the plaintiff; the learned Judge giving leave to the defendant to move to enter a nonsuit on the above point. *Erle* having in the early part of this term (November 8) obtained a rule accordingly,

W. H. Watson and *Macaulay* now shewed cause.—A bill of particulars is no part of the record, and therefore is not properly the subject of technical objection. The only question which the Court will look to is, whether the terms in which the particulars are expressed be such that the defendant could be misled as to the nature of the plaintiff's demand. Here the particulars say that the plaintiff seeks to recover two sums of £50, the amount of two promissory notes, for the recovery of which he will avail himself of the whole or any part of the declaration. Now that statement is clearly applicable to the count on the account stated, as well as to the other counts of the declaration, and it was impossible that the defendant could be misled; which is the criterion by which the Courts are guided. *Davis v. Edwards* (a), *Fisher v. Wainwright* (b). In *Hay v. Fisher* (c), the particulars stated the action to be brought to recover the sum of 23*l.* 12*s.*, "being the amount of the bill of exchange mentioned in the first count of the declaration, and also the sum of 6*l.* 19*s.*, being the amount with interest due on the said bill, &c.; and the plaintiffs will rely upon the whole or any part of their declaration for the recovery thereof;" and they were held sufficient to entitle the plaintiff to proceed on the second count. Nothing could well be more similar than those particulars and the present. There is no difficulty here, because the amounts were identical; £100 was the amount mentioned in the count upon the count stated, and was also the amount stated in the counts on the two bills of exchange. Particulars of demand are given in order to point out what is sought to be recovered under

(a) 3 M. & Selw. 380. (b) 1 M. & W. 480. (c) 2 M. & W. 722.

the common counts; not on bills of exchange, which are sufficiently specific of themselves. *Cooper v. Amos* (a). [Parke, B.—The only question is, whether the £100 mentioned in the count on the account stated relates to the same sum as that which is sought to be recovered under the counts on the promissory notes.] If the evidence adduced really related to any other debt, the defendant might have made an affidavit that he was misled by the particulars of demand.

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Erle, contra.—As to the evidence applying to any other debt besides that due on the promissory notes, there is a fallacy in assuming that those notes bore date before the conversation proved, or that even they existed at all, of which there is no evidence. The notes were not given in evidence at all, and there is no ground for saying that there were no other dealings between the parties; and therefore the conversation proved is just as good evidence of goods sold, money lent, or any other species of demand, as of an account stated. In *Breckon v. Smith* (b), the plaintiff declared for goods sold, and on an account stated. The particular of demand was, “To a beast sold and delivered, 13*l.* 10*s.*” The only evidence was, that the plaintiff admitted, in a conversation with a third person, not shewn to be an agent of the plaintiff, that he owed the latter 13*l.* 10*s.*, and it was held that this was no evidence of an account stated, and that it was not evidence on the count for goods sold, as it was not shewn to be applicable to the particular. That case is directly in point.

Lord ABINGER, C. B.—At one time during the argument of this case, I was under the impression that the plaintiff's counsel had succeeded in shewing, by decided cases, that the opinion I expressed in this matter at the trial was an erroneous one. That opinion, which I held

(a) 2 Car. & P. 267.

(b) 1 Ad. & Ell. 488.

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at the trial, and still retain, is, that the account stated must be shewn to have reference to the promissory notes mentioned in the bill of particulars; and I regret to find that the rest of the Court coincide in that opinion, for I believe the justice of the case is on the other side. Under all the circumstances, however, we will make this rule absolute for a new trial on payment of costs, and give the plaintiff leave to amend his particulars.

PARKE, B.—I quite agree in the opinion that these particulars ought to be read as having reference to the account stated merely; in short, as if they were “I seek to recover on the account stated the sum of 100*l.*, the amount of the promissory notes,” (describing them). On such a particular, the plaintiff is bound to prove an account stated with reference to those promissory notes, which he might do, either by shewing that the conversation had reference to two such notes, or that, in the absence of proof of the existence of any others, the conversation might fairly be presumed to relate to them. The conversation, however, detailed by the witness in this case, proves neither one nor the other; for it does not in terms refer to promissory notes at all, nor does it contain any proof that there were any; and in the absence of any evidence to shew that such notes were in existence, beyond the statement in the declaration, which may be altogether imaginary, we must deal with the case as if they were not, and make this rule absolute accordingly.

GURNEY, B.—I had some little doubt at first, whether we ought not to have required the defendant to make an affidavit that he was misled by the particulars; but I now agree with the rest of the Court that that is not necessary.

ROLFE, B., concurred.

Rule absolute for a new trial.

OWEN v. SCALES.

ASSUMPSIT on an attorney's bill.

Plea, that no bill of the plaintiff's charges, subscribed with the proper hand of the plaintiff, had been delivered before the commencement of the action. Replication, traversing this allegation.

At the trial, before Lord *Abinger*, C. B., at the London sittings after last Trinity Term, the plaintiff proved the delivery of the bill, which was thus signed:—"This is our bill. For self and Robert Owen, J. H. Dixon." It was contended, on behalf of the defendant, that this was not a proper signing of the bill within the 2 Geo. 2, c. 23, s. 23. The learned Judge overruled the objection, and the plaintiff had a verdict, leave being reserved to the defendant to move to enter a nonsuit. *Crowder* having obtained a rule nisi accordingly,

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A bill for work done by two attorneys in partnership, was delivered signed by one of them, in the following terms: "This is our bill. For self and Robert Owen, J. H. Dixon:"—*Held*, that this was a sufficient signature within the stat. 2 Geo. 2, c. 23, s. 23.

Erle and *Creasy* shewed cause.—The signature of this bill is a sufficient compliance with the statute 2 Geo. 2, c. 23, s. 23, which requires the bill to be "subscribed with the proper hand of such attorney or solicitor." It will be said, on the other side, that the signature ought to have been in the name of the firm, which was "Owen & Dixon," and that there was no such firm as Owen & Self. In *Smith & Jago v. Brown* (a), a bill for business done by two attorneys in partnership, signed by one in the name of the firm, was held to be a sufficient subscription within the statutes 3 Jac. 1, c. 7, and 2 Geo. 2, c. 23, although the signature did not contain the christian name of the partners. In this case there is the christian name of one partner, and the initials of the other. In *James v. Swift* (b), a notice of action to a magistrate, signed by the attorneys

(a) 1 Cr. & J. 542.

(b) 4 B. & C. 681; 6 D. & R. 625.

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with their initials, was held sufficient. An attorney's signed bill is in the nature of a notice to the party sought to be charged; *Colling v. Treweek* (a). In *Wilks v. Back* (b), it was held that one who executes a deed for another under a power of attorney, must execute in the name of his principal; but if that be done, it matters not in what form of words such execution is denoted by the signature of the names. And *Lawrence, J.*, there says, there is no particular form of words required to be used, provided the act be done in the name of the principal.

Crowder and Hurlstone, contra.—The plaintiff has not proved the issue, viz., that the bill was subscribed by the proper hand of the attorneys, for it was not shewn that Dixon had any authority to sign as agent for his partner, and the signature ought therefore to have been in the name of the partnership firm. The case of *James v. Swift* was that of a notice to a magistrate, and does not apply to a case like the present. Here the statute makes the signature the title to sue, and therefore it must be strictly complied with.

LORD ABINGER, C. B.—I am of opinion that this rule ought to be discharged. If we were to decide this question according to the precise words of the statute, we should be carrying the enactment much farther than the framers of it contemplated. The act says that the bill shall be subscribed with the proper hand of the attorney; but suppose one of two attorneys die before signing his bill, can no action be brought by his partner or his representatives? or suppose one of two partners remains abroad,—the Statute of Limitations may run before his signature can be obtained. *Smith v. Brown* shews, that in the case of attorneys in partnership, a signature in the name of the firm is sufficient;

(a) 6 B. & C. 394; 9 D. & R. 456.

(b) 2 East, 142.

and surely a signature, as in the present case, by one attorney for himself and partner, must equally be sufficient. One partner has authority to sign for his co-partner, and I see no reason why he should be compelled to use that which is strictly the partnership firm, so that he does it in substance.

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PARKE, B.—The question is, whether the present signature is sufficient; and I think it is, on the authority of *Smith v. Brown*, which was decided under this same statute. There it was contended that the christian name of the partners ought to have been used, and that the signature should have been by both; but the answer of *Bayley, J.* is that the subscription is correct both as to names and signatures. The act does not make naming necessary, unless in the subscription. All that is required is, that the attorney should, as it were, earmark the bill, so as to shew it to be his. It is sufficient if he makes it appear to be his and not another's bill. That has been done here. The object of the act was, that the bill should be signed by the attorney himself, and not merely by his clerk or servant.

GURNEY, B.—I cannot distinguish this case from that of a partner who signs the name of the firm. Here we have, in addition, the christian name of one party and the initials of the other.

ROLFE, B.—The issue here is, whether the subscription to the bill was by the proper hand of the plaintiffs. I think it was, on the authority of *Smith v. Brown*, which decides that the signature of one partner is the signature of both. Dixon signs the bill for the plaintiff, and also for himself; the plaintiff has therefore signed this bill, within the meaning of the statute.

Rule discharged.

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1842.

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v.
HATTON.

PARKE, B.—It is clear that the arbitrator had no power to determine what was the property in dispute. He was simply to fix the price, and the other terms on which it was to be conveyed to the defendant. If there be any difficulty as to the premises awarded upon, that may be an answer to an attachment for not performing the award, but forms no objection to the award itself. As to the use of the plaintiff's name, I think the arbitrator had power to impose that condition; or if he had not taken that course, he might have reduced the price that the defendant was to pay for the land.

GURNEY, B., and ROLFE, B., concurred.

Rule discharged, with costs.

Nov. 19.

DAWSON v. WILLS.

The jurat of an affidavit is not vitiated by the erasure of words which form no necessary part of the jurat, and might be separated from it without altering the sense.

WARREN had obtained a rule to set aside the writ of summons, or the service thereof, on the ground that the copy described the writ as issued A. D. 1802.

Corrie, on shewing cause, objected that the affidavit on which the rule was obtained was not receivable, in consequence of an erasure in the jurat, which was as follows:—

“Sworn at the city of Exeter, this tenth day of November, eighteen hundred and forty-two, before me: and I certify that the ×	}	The mark of × Robert Willis.
--	---	------------------------------------

A commissioner for taking affidavits in this Court (a).

(a) These words were struck through with a pen.

And the jurat was continued at the top of the back of the paper, thus:—

“ above affidavit was read over in my
presence to the defendant, who seem-
ed perfectly to understand the same,
and made his mark thereto in my
presence.”

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John Gidley,

+ A commissioner for taking affidavits in
the said Court.”

Corrie objected, that any erasure whatever in the jurat of an affidavit vitiated it altogether. In *Williams v. Clough* (a), a line drawn through two words in the jurat of an affidavit, leaving them however perfectly legible, was held to be an erasure within the rule of Court of Michaelmas Term, 37 Geo. 3, and to vitiate the affidavit, although the omission or retention of the words would not vary the sense. Besides, the rule asks for too much; where the defect is in the service, the defendant has no right to ask the Court to set aside the writ: *Truslove v. Whitchurch* (b). If the rule had merely asked to set aside the service, the plaintiff might have waived it as irregular, and served a fresh copy.

LORD ABINGER, C. B.—Where any word is struck out of the jurat which in any degree alters the sense of it, the whole is bad. But nothing is more common than to erase the jurat altogether, and write a new one. Now, the words erased here, “A commissioner for taking affidavits, &c.” form no part of the jurat. As to the second point, the rule is in the alternative; and certainly the defendant is entitled to one branch or other of it. Under the cir-

(a) 1 Ad. & Ell. 376. (b) 1 Scott, N. R. 415; 1 Man. & G. 426.

Esch. of Pleas, 1842. cumstances, this rule must therefore be made absolute to set aside the service of the writ, with costs.

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ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

Nov. 19.

LEVY v. MAGNAY.

An action having been brought against the sheriff to recover a less sum than 20*l.*, the plaintiff applied to a Judge to have the cause heard before the coroner, under the 3 & 4 Will. 4, c. 42, s. 17, which the defendant opposed, on the ground that the coroner was not the person before whom the act empowered the Court to order a case to be tried; and the Judge refused the order on that ground. Proposals were then made to try the cause before the Judge of the Palace Court, or to change

KENNEDY had obtained a rule to shew cause why the Master should not review his taxation, and tax the plaintiff's costs upon the lower scale, according to the "Directions to Taxing Officers," Hilary Term, 1834. It appeared that the action was an action of debt against the sheriff: the writ was indorsed to recover the sum of £19. The defendant pleaded the general issue. The plaintiff had applied to a Judge to have the cause tried before the coroner, pursuant to the 3 & 4 Will. 4, c. 42, s. 17. This was opposed on the ground that the coroner was not a proper person within the act before whom the cause could be tried, and Gurney, B. refused the order on that ground. The plaintiff then applied (without any summons) to try before the Judge of the Palace Court, or that the venue might be changed to some other county, but no order was made. The defendant soon after took out a summons to pay the £9 into Court and have the proceedings stayed, which was refused. He then took out a summons to withdraw his plea and suffer judgment by default; and an order to that effect was accordingly made *without any mention of costs*. The

the venue; both of which were objected to by the defendant. The defendant then obtained leave to withdraw his plea and suffer judgment by default, and an order was accordingly made, which made no mention of the costs:—*Held*, that the plaintiff's costs must be taxed on the lower scale prescribed by the rule of H. T., 4 Will. 4, and that if he wanted to tax on the higher scale, he ought to have applied to the Judge, on the summons to allow the defendant to withdraw his plea, to make it a condition that they should be so taxed.

Semble, that the Court has no power, under 3 & 4 Will. 4, c. 42, s. 17, to direct a writ of trial to the coroner.

Master taxed the costs on the higher scale, on the ground that the defendant ought not to have opposed the cause being tried before an inferior Court. The defendant then applied to *Gurney, B.*, for an order for the Master to review his taxation, but the learned Judge thought that the Master was right, and refused to interfere.

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Martin now shewed cause against the above rule, upon an affidavit which disclosed facts tending to shew that the defendant's proceedings had been vexatious, and used for the purpose of delay. He contended, first, that the directions to taxing officers were not peremptory; secondly, that this case did not fall within the rule, as the debt here had not been *recovered*; thirdly, that the Court would look at the conduct of the parties and the equity of the case; fourthly, that *Gurney, B.*, having refused the application, the Court ought not to interfere.

Kennedy, in support of the rule, cited *Cook v. Hunt (a)*, and contended that the debt had been *recovered*, within the meaning of the rule; and he urged, that if the plaintiff wanted the costs to be taxed on the higher scale, he should have applied to the Judge who gave the defendant leave to withdraw his plea, to make that condition a part of the order.

LORD ABINGER, C. B.—I think it best to adhere to the general rule. If we were to listen to such applications, and enter into the merits of every case, we should in reality have no rule at all, and we think the best way is to adhere to the settled rule.

ALDERSON, B.—If we were to allow ourselves to enter

(a) 5 M. & W. 161.

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into the merits of cases of this nature, we might as well have no rule at all, as the Master would tax every bill with the knowledge that a discretion would be exercised over him by the Court, which would render taxations endless. The intention of the rule was, that where defendants were driven to try at *Nisi Prius* cases involving sums under £20, the costs of the plaintiff should be taxed on the lower scale; and this on the ground that he ought to have had recourse to a cheaper mode of trial. Here he has endeavoured to do so, but was prevented by the improper conduct of the defendant, who afterwards changed his mind as to defending the action, and applied for leave to withdraw his plea on payment of the debt due to the plaintiff. This of course could only be done by permission of the Judge; so that, in making the rule absolute, we shall not introduce any evil for the future, since all that plaintiffs will have to do under similar circumstances will be to apply to the Judge to allow the action to be discontinued, unless the defendant will consent to let the costs be taxed on the higher scale. It is for the Judge who makes such an order to take all the circumstances of the case into his consideration; but where there is no order for the purpose, we have a definite rule to go by, which it is better to adhere to, although perhaps productive of hardship in the particular instance.

The other Barons concurred.

Rule absolute.

GIBSON and Another, Assignees of BIRCH, a Bankrupt, v.
KING.

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1842.

Nov. 23.

TROVER by the plaintiffs, as assignees under the bankruptcy of one Emily Ann Birch; the declaration containing counts on the possession of the bankrupt, and also on that of the assignees.

The defendant pleaded, first, not guilty; secondly, that the plaintiffs were not assignees of the said Emily Ann Birch: and he gave notice of his intention to dispute the trading and act of bankruptcy.

It appeared at the trial, before *Alderson*, B., at the Middlesex sittings in this term, that some time previous to the alleged bankruptcy, Mrs. Birch took a house in Bedford-place, where she went to reside with her family, and fitted it up as a boarding and lodging house, and let lodgings accordingly to different persons per week or month, according to agreement and the quality of the rooms they occupied, wine and some other extras being charged separately. The lodgers had their several bedrooms, and took all their meals with the mistress of the house. Under these circumstances, it was objected, on behalf of the defendant, that Mrs. Birch was not a trader as an hotel keeper, within the meaning of the 2nd section of the Bankrupt Act, 6 Geo. 4, c. 16, and consequently ought not to have been made a bankrupt. The learned Judge overruled the objection, reserving leave to the defendant to move to enter a verdict, and directed the jury to find a verdict for the plaintiffs.

A person who keeps a boarding and lodging house, where guests are entertained by the month or week, each having a bed-room to himself, but taking his meals with the proprietor of the house, is a trader within the 6 Geo. 4, c. 16, s. 2, which provides that all "vic-tuallers, keep-ers of inns, taverns, hotels, or coffee-houses," shall be subject to the bankrupt laws.

Kelly now moved accordingly. The question in this case is, whether a person who keeps a boarding and lodging house, and who receives persons into her house as lodgers, and contracts to provide for them at her own table out of one common stock of provisions, is a trader within the meaning of the 6 Geo. 4, c. 16, s. 2. That section enacts,

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"that all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, and persons insuring ships or their freight, or other matters, against the perils of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels, or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandize by way of bargaining, exchange, bartering, commissions, consignment, or otherwise, in gross or by retail; and all persons who, either for themselves or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt." It is true, that in the case of *Smith v. Scott (a)*, it was held that the keeper of a private lodging house, over which there was no sign, who took in her guests to board for longer or shorter periods, according to circumstances, and made a profit by supplying them with provisions if required, fell within the word "hotel keeper" in this section; but, supposing that case to be sound law, it is distinguishable from the present on two grounds; first, that the bankrupt there took in guests to lodge by the night; and secondly, that the provisions supplied were kept separate for the use of the individuals who ordered them, and did not form part of a common stock to supply a common table, as in the present case. In that case the provisions were cooked for the lodger for profit, so that there was a direct buying and selling; which can hardly be said to be the case where what is provided forms one common stock. It would be carrying the construction of this act a great way, to say that a person who keeps a lodging house, and merely provides, at the request of the person lodging, a dinner at his own table, is to be deemed a trader within the bank-

(a) 9 Bing. 14; 2 M. & Scott, 35.

rupt laws. It is at all events a different case from the one where the person supplies provisions not for his own use at all, but for the use of his lodgers at a profit. In the case of *Smith v. Scott*, there were these distinctions: first, that the lodger sometimes stayed only a single night, which brings it near to the ordinary case of an hotel keeper; and secondly, that the provisions were supplied in the same manner as they usually are in an hotel. [Lord Abinger, C. B.—Here we have the authority of the Court of Bankruptcy that this constituted a trading within the act(a).] If this is to be considered a trading, we shall scarcely know where to stop; it will be difficult to distinguish the case of a lodging-house keeper from that of a schoolmaster, or even from the case of any individual who may at any one time receive a person to board or lodge in his house. [Alderson, B.—The case of a schoolmaster is plainly distinguishable.] Yes: it may be said that the primary object there is the giving instruction. But if a person who keeps a private lodging house is to fall within the operation of the bankrupt laws, it would be very difficult to distinguish it from the case of the *Dames* at Eton, or from that of persons who keep furnished houses in the neighbourhood of large schools, where the masters or persons connected with the schools reside, and have their own houses in which to feed and board the boys attending the schools. It cannot be said but that such persons in some way furnish provisions, and buy and sell them at a profit, and are in that sense of the word hotel keepers, and so subject to the bankrupt laws.

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v.
KING.

LORD ABINGER, C. B.—I think there is no ground at all for this motion, and I am not disposed to resuscitate the question already decided in the Court of Common Pleas. It appears to me that this is rather a stronger case.

(a) The judgment of Sir John Cross to this effect was pronounced on the 10th of July, 1842.

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v.
KING.

PARKE, B.—The case of *Smith v. Scott* having been decided, I think the present one cannot be distinguished from it, and therefore that this person was a trader, and liable to the bankrupt laws.

ALDERSON, B.—I am of the same opinion. It appears to me that this case is stronger than that of *Smith v. Scott*. That was the case of a lodging-house keeper; this is the case of a person who takes people in to board, and makes a profit by every body who comes to the house. I think the case comes within the meaning of the act of Parliament.

Rule refused.

Nov. 23.

DOE d. CARTER and Others v. ROE.

Where a person held premises under an agreement in writing, from quarter to quarter, and the agreement provided that the tenant should quit possession upon receiving six months' notice in writing, and in the event of his losing his license to sell ale, &c., through misconduct at any time during the term, should then forthwith quit possession, on being requested so to do by his landlord: *Held*, that he had neither a

BROS had obtained a rule calling upon one Edward Griffin, the tenant in possession of the premises sought to be recovered by this ejectment, to shew cause why, on being admitted defendant, besides entering into the common rule and giving the common undertaking, he should not enter into the recognizance required by the stat. 1 Geo. 4, c. 87, s. 1, to pay the costs and damages which should be recovered by the plaintiff. It appeared that Griffin had been put into possession of the premises in question by one James Collins, who had taken them from a Mr. Spenlove, under a memorandum of agreement dated the 14th of October, 1840, and made between James Collins of the one part and John Francis Spenlove of the other part, signed by both parties, which, after reciting that Spenlove had let to Collins all the messuages and premises in question, to hold them from the 31st December, 1840, as tenant from quar-

tenancy from year to year, nor a term certain in the premises, within 1 Geo. 4, c. 87, s. 1, so as to entitle the landlord in ejectment to compel him to give security for costs under that act.

ter to quarter, at the quarterly rent of five guineas, it was witnessed, that Collins, his executors, &c. did thereby agree that he would, during the tenure of the said messuage, obtain a license to sell ale &c., and that he would quit possession *at the end of any three calendar months*, upon receiving notice in writing; and that if he should lose his license, he would then forthwith quit possession on being requested by Spenlove, and without any notice for that purpose. The lessors of the plaintiff were the devisees of Spenlove, and had given the tenant a three-months' notice to quit, which expired on the 31st of March, 1842.

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ROE.

Marsh shewed cause.—This application is founded on the stat. 1 Geo. 4, c. 87, s. 1, which enacts “that where the term or interest of any tenant now or hereafter holding under a lease or agreement in writing, any lands, tenements, or hereditaments, for any term or number of years certain, or from year to year, shall have expired or been determined either by the landlord or tenant, by regular notice to quit; and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing &c., and the landlord shall thereupon proceed by action of ejectment for the recovery of possession &c.,” it shall be lawful for the landlord to move the court for a rule for such tenant or person to shew cause why such tenant or person, on being admitted defendant, besides entering into the common rule and giving the common undertaking &c., “should not enter into a recognizance by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the plaintiff in the action &c.” Now in this case the agreement does not shew either a holding for a term or number of years certain, or a tenancy from year to year. This is an act conferring an extraordinary remedy on landlords, and therefore the Courts will not extend it, if the case be not strictly within the act. In *Doe*

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d. Pemberton v. Roe (a), a tenancy for years determinable on lives was decided not to be within the act. So in *Doe d. Bradford v. Roe (b)*, where a tenant held from year to year, but without a lease or agreement in writing, it was held not to be within the act. In *Doe d. Cardigan v. Roe (c)*, the statute was held not to extend to a lessee holding over after notice to quit given by himself, where the tenancy had not expired by effluxion of time. And in *Doe d. Tindal v. Roe (d)*, Lord *Tenterden* laid it down generally that the statute "applies only to cases where the tenancy, if by lease, has expired by effluxion of time; or if by a yearly tenancy, where it has been determined by a regular notice to quit," and he adds, "the words used by it are clear and unambiguous." And *Parke, J.*, there says, "I own that if it were not for the case of *Doe d. Cardigan v. Roe*, I should be of opinion that this was a case not only within the mischief, but within the fair meaning of the terms of this act. But after the decision in that case, which decision has been acquiesced in for some time, I think it better to observe uniformity in the practice, and not overrule that determination, by going out of the words into that which we may conceive to be the substantial meaning of the act."

Bros., in support of the rule.—Here the agreement constitutes the tenancy. Although it commences by a recital, it fixes the terms of the tenancy, viz. to hold from the 31st of December, as tenant from quarter to quarter at a quarter's notice; that is a holding for half a year at least, as the lessee is to have the premises for one quarter absolutely, subject to a quarter's notice determining the tenancy. That is enough to constitute an agreement for a term certain, within the meaning of the act. It is a holding for a term certain, though not from year to year, and the legis-

(a) 7 B. & C. 2.
(b) 5 B. & Ald. 770.
(c) 1 D. & R. 540.

(d) 2 B. & Adol. 922; 1 Dowl.
P. C. 146.

lature, by introducing the words "or from year to year," do not render it less a term certain.

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LORD ABINGER, C. B.—The statute itself makes a distinction between a tenancy for a term certain and one from year to year, and I am of opinion that the present holding does not come within either description. The rule must therefore be discharged; but as there was a reasonable doubt whether the case was within the act, it must be discharged without costs.

PARKE, B.—The tenancy in this case is not for a term certain, as it depends upon the time when notice to quit is given. As soon as notice is given on the first day of the quarter, then it becomes a term for three months certain; until then, the term is uncertain.

ALDERSON, B.—I am of the same opinion. The mere insertion in the agreement of a particular time does not render the holding a "term certain."

ROLFE, B., concurred.

Rule discharged, without costs.

FROST v. HAYWARD.

Nov. 24.

THIS was an interpleader rule, obtained under the 1st section of the 1 & 2 Will. 4, c. 58. *Pashley*, who appeared for the claimant, objected that the jurat of the affidavit on which the rule was obtained was defective. The affidavit purported to be sworn before "J. L., a Master extraordinary in the High Court of Chancery;" but it was clear that an affidavit intitled in the Court of Exchequer could be taken only before a commissioner of this Court. He insisted

A rule obtained upon an affidavit, which, in the jurat, was stated to be sworn before "J. L., a master extraordinary in the High Court of Chancery," was for this defect discharged with costs.

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that for this defect the rule must be discharged *with costs*, and for this cited *Houlden v. Fasson* (a), *Blackwell v. Allen* (b), and *Shaw v. Perkin* (c).

J. Henderson, for the defendant.—On reference to the list of commissioners for taking affidavits in this Court, it will be found that the person before whom this affidavit was sworn is in fact one of those commissioners, as well as a Master extraordinary in Chancery : and the Court will take judicial notice of its own officers, and not permit a mere verbal error such as this to vitiate the affidavit, or, at all events, to subject the party to costs.

LORD ABINGER, C.B.—I certainly should be much disposed to disallow this objection if I could, but I think we cannot take judicial notice of the names of our officers. The rule must therefore be discharged ; and upon the authority of the cases which have been cited, it must be discharged with costs, to be paid by the defendant, to whose negligence the mistake is attributable.

PARKE, B., and GURNEY, B., concurred.

ROLFE, B.—In *Blackwell v. Allen*, the Court were induced to discharge the rule without costs, on the ground that such had been the usual practice ; but certainly that was imposing the costs of an error on the wrong party.

Rule discharged, with costs (d).

(a) 6 Bing 236 ; 4 Mo. & P. 126.

(b) 7 M. & W. 146.

(c) 1 Dowl. P. C. (N. S.) 306.

(d) On the authority of this case, and of the others referred to above,

the Court of Queen's Bench, in a case of *Doe d. Hill v. Hill*, E. T., 1843, discharged a rule *with costs*, for a similar defect in the affidavit on which it was obtained.

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Nov. 23.

DOE *d.* PRATTEN *v.* BOARD.

THE plaintiff having delivered a declaration in ejectment, and obtained a rule for judgment, the defendant delivered a plea, together with the consent rule signed by him, signed judgment of non pros. for want of a replication, and taxed his costs. The lessor of the plaintiff did not enter into the consent rule; and having on this ground refused to pay the costs, *Thomas* obtained a rule calling upon him to shew cause why he should not pay the costs of the judgment of non pros., or join in the consent rule. The application was founded on Reg. Gen. H. T. 4 Vict., which provides, "that a party entitled to appear to a declaration in ejectment, may appear and plead thereto at any time after service of such declaration, and before the end of the fourth day after the term in which the tenant is required by the notice to appear, and may proceed to compel the plaintiff to reply thereto, or may sign judgment of non pros., notwithstanding such plaintiff may not have obtained a rule for judgment on such service of declaration; and that a plaintiff who may have omitted to obtain a rule for judgment within the time prescribed by the present rules and practice, shall be entitled, on production of such plea, to an order of a Judge for leave to draw up a rule for judgment, as of the time at which such rule should have been obtained."

After a rule for judgment in ejectment against the casual ejector, the defendant delivered a plea and consent rule, in the latter of which the lessor of the plaintiff never joined, and judgment of non pros. was afterwards signed:—*Held*, that the Court had no power, either under the rule of H. T., 4 Vict., or otherwise, to compel the lessor of the plaintiff to pay those costs, or join in the consent rule.

Prideaux now shewed cause.—The Court has no authority to grant this application, for it has no power to award costs against the lessor of the plaintiff before he has entered into the consent rule, because until then the real parties are not before the Court: *Goodright d. Ward v. Badtittle* (a), which was fully recognised in *Doe d. Vernon v. Roe* (b). And

(a) 2 W. Black. 763.

(b) 7 Ad. & Ell. 14; 2 Nev. & Per. 237.

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although they will stay the proceedings in a second ejectment, brought for the same premises, until the costs of the first are paid, *Doe d. Langdon v. Langdon* (a); that principle does not apply where the suit is already at an end. Secondly, the Court cannot compel the plaintiff to enter into the consent rule; for the proceedings in the cause being at an end, they cannot compel a person who never was before the Court to take a step in the cause; although, if he came in to ask a favour, they might impose that upon him as one of the terms of granting it. The rule of H. T. 4 Vict. does not apply, the object of that rule being to enable the real defendant to appear and defend the action, without the formal proceeding of obtaining a rule for judgment against the casual ejector.

Thomas, in support of the rule.—The lessor of the plaintiff, by appearing on the present occasion, has declared himself to be the real plaintiff in the suit, and that at least gives the Court jurisdiction over him. But the rule is also applicable, for the intention of it was that the defendant should be entitled to costs, the object of it being to prevent defendants from being harassed by vexatious proceedings in this action.

LORD ABINGER, C. B.—I am of opinion that the Court has no power to grant costs in this case. The rule of H. T. 4 Vict. was made for the convenience of defendants, and not in order to punish plaintiffs in ejectment. These costs were therefore improperly taxed, and as there was no ground for moving for this rule, it must be discharged with costs.

PARKE, B.—The general rule in question applies to those cases only where no judgment against the casual

(a) 5 B. & Adol. 864; 2 Nev. & Man. 848.

ejector has been moved for on the part of the plaintiff, and the intention of it was to give the tenant the benefit of an opportunity to come in and defend the action, without putting him to the trouble of searching to see if judgment against the casual ejector had been moved for. The rule is not very clearly expressed, as to the consequences of the plaintiff's not proceeding afterwards: but, at all events, it is applicable to those cases only where parties have availed themselves of its provisions; and as far as the old practice is concerned, the authorities cited by Mr. *Prideaux* are clear to the point, that the Court has no power to compel the lessor of the plaintiff to pay the costs of a judgment of non pros. until he enters into the consent rule.

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Dor
d.
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BOARD.

ALDERSON, B., and ROLFE, B., concurred.

Rule discharged, with costs.

HORLOCK *v.* LEDIARD.

Nov. 23.

IN this case, which was an action of trespass, *R. V. Richards* moved for a rule to shew cause why the plaintiff should not deliver to the defendant particulars of the grievances on which he relied, and the particular premises and places in which he intended to allege them to have been committed. The affidavit in support of the application in substance stated, that the defendant had read a copy of the declaration, and that, from the general and vague form thereof, he was unable to ascertain the grievances which the plaintiff intended to rely on, and that unless the plaintiff described the same by metes and bounds, and the times when committed, it would be impossible to plead to the action.—As long as the plaintiff is allowed to declare in this general form, the defendant ought to be allowed par-

The Court will not grant particulars in an action of trespass, on the mere affidavit of the defendant that he had read the declaration, and that from the general and vague form thereof he was unable to ascertain the grievances on which the plaintiff intended to rely; but some special ground must be shewn as a reason for granting the rule.

Exch. of Pleas, particulars of the grievances of which the plaintiff complains.
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PARKE, B.—The Court always requires some special grounds for an application of this kind, otherwise, in every case of trespass, it would be a step in the cause to apply for particulars on the affidavit of the defendant, who would never know what the grievances complained of were. There ought to be some special ground alleged, or some statement of the peculiar nature of the property given, as a reason for granting a rule requiring the delivery of particulars.

Lord ABINGER, C. B., ALDERSON, B., and ROLFE, B., concurred.

Rule refused.

Nov. 25.

HIBBERT v. BARTON.

Where a cognovit, executed since the passing of 1 & 2 Vict. c. 110, was attested as follows—"Witnessed by me, W. P., as the attorney of the said A. B., attending at the execution hereof at his request, and expressly named by him:"—*Held*, that it was insufficient.

The attestation ought to contain words which shew with certainty

that the subscribing witness is the attorney of the party executing it, and that he attests or subscribes the execution as such attorney.

KELLY had obtained a rule calling upon the plaintiff to shew cause why the cognovit given by the defendant in this action, and on which judgment had been signed and execution issued, should not be set aside, on the ground that its execution was not attested in the manner required by 1 & 2 Vict. c. 110, s. 9. The attestation was as follows: "Witnessed by me, William Pemberton, as the attorney of the said William Barton, attending at the execution hereof at his request, and expressly named by him.—William Pemberton, Prescott, Lancashire." The ground of objection was, that the attestation did not contain an express allegation that the subscribing witness was the attorney of the defendant.

Erle and *Atherton* now shewed cause.—The question here turns on the construction of the stat. 1 & 2 Vict. c. 110, s. 9, which enacts, that “no warrant of attorney or cognovit actionem shall be of any force, unless there shall be present some attorney of one of the superior Courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney:” and the question is, whether the provisions of this section are not virtually complied with, by the attorney declaring in the attestation that he witnesses the document as the attorney for the party signing, or whether an additional averment is necessary, that he was the attorney acting for the defendant on the occasion in question, and that he signs his name as such. The statute does not prescribe any particular form of attestation. Thus, although it says the attorney shall “thereby declare” himself such, the meaning of either of these two words might be expressed by words equivalent. The question therefore is entirely one of legal effect; and in this point of view, a man’s declaring that he acts and subscribes as attorney for a party, would be a sufficient allegation, even in pleading, that he was the attorney of that party. An averment in a declaration that A. B. sues as the executor of C. D. has been always considered as a sufficient allegation of A. B.’s representative character. *Elkington v. Holland* (a) was relied upon on moving for this rule, but that case is distinguishable from the present, and besides, the Court were not unanimous upon this point. There the allegation was, “I subscribe myself as attorney for the said J. A., expressly named by him to attest his

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(a) 9 M. & W. 695.

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execution of these presents ;" which is consistent with his not being the attorney of J. A. at the time of the execution of the warrant of attorney, as he might have previously revoked the authority. And further the attestation there did not contain the words " attending at the execution hereof at his request." But here the attestation states that the witness is clothed with the character he assumes, as well as that he attended as such at the defendant's request. The attestation is therefore sufficient.

Kelly, in support of the rule.—It would be impossible to hold this attestation to be sufficient, without overturning the principle of every decision which has occurred on this subject. That principle has been, to enact a substantial, if not a literal, compliance with the words of the act, which in express terms requires that two distinct things shall appear in the attestation ; one, that the attorney subscribes his name as a witness for the party executing the document ; the other, that he is the attorney for the party, and that he subscribes his name as such. To allow an exemption from either of these requisites, or to hold that one is included in the other, would be contrary to the plain intention of the legislature. If otherwise, a person might attest the instrument *as* the attorney, without having seen it before, or even without being an attorney at all. But the act requires that he shall declare that he is the attorney of the party, and that he attests as such.

Lord ABINGER, C. B.—It appears to me that the attestation to this *cognovit* is insufficient, and this rule must therefore be made absolute, on the terms of the plaintiff restoring the money levied, and the defendants undertaking to bring no action. A glance at the spirit of modern legislation will assist us in forming our judgment on questions of this nature. No man can doubt that the feeling of the times, whether rightly or not it is unneces-

sary to say, runs in favour of defendants and of prisoners ; and this section of the act of Parliament under consideration was passed with a view to carry still further than before certain provisions which had existed in their favour by the rules of the courts at Westminster. Under these circumstances, we must look at the act of Parliament, and construe it as well as we can. I do not say that this attestation would not be *primâ facie* evidence of Pemberton's being the attorney of the defendant, or possibly even sufficient to warrant a verdict against him in an action for negligence. But in this section the legislature requires something more, and provides, not only that the party executing a *cognovit* or warrant of attorney shall have an attorney employed by himself, present attending the execution of the instrument, in order to acquaint him with the nature and consequences of the act he is about to do, but further, that the attorney so attending shall subscribe his name to the document as a witness to the due execution thereof, and thereby, that is to say, by such attestation or subscription of his name, declare himself to be such attorney, and that he subscribes the paper as such : in a word, he must not only be the attorney employed at the time, and declare himself such by his attendance, but he must subscribe his name as such. The legislature requires two things to be done, one of which might perhaps have been dispensed with ; but as they require two, we are not at liberty to say that, in prescribing either, they used redundant words, and that a compliance with the other only is sufficient. I think, therefore, that the safest rule for us to follow will be, to construe the act literally, and say, that although we may not see the use of this double provision, still, as the legislature requires it, we must enforce it. It is possible that there may be a case where a distinction might be taken between the two things prescribed by the latter part of this section, as conditions requisite to the validity of such an attestation. Suppose, for instance, a man about to execute a warrant of at-

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torney or a cognovit had a private friend an attorney, and the question arose whether, by his signature as such to the instrument, the statute had been complied with. In such a case it would be perfectly competent to him to swear that he subscribed the instrument as attorney for the party, although in fact he was not the attorney in the actual transaction, and did not know what the document was about. Suppose the client were to say, "You are my attorney, please to sign this paper for me," which he does. The man is his attorney in other matters, and may therefore truly state himself to be his attorney, and it is equally true that he signs as such, and yet the intention of the statute would not be complied with: so that we see there may be cases where a man might subscribe such a document as an attorney, and yet not be the attorney for the party signing in the actual transaction, and consequently not authenticating the instrument with that evidence which the statute requires, namely, that he was the attorney in the particular transaction. If the case I have put be possible, it shews this construction of the statute to be correct; and I own I am disposed to follow the words of the act, and as it requires both clauses to be inserted in the attestation, they ought to be so inserted. In the course of the argument, several decided cases were referred to, all of which, however, have reference to the other part of this section, which requires that the attorney present on the part of every person signing a cognovit or warrant of attorney shall be expressly named by him, and attending at his request, in order to inform him of its nature and effect. Undoubtedly it seems a somewhat unnecessary thing, after that, to declare himself as the attorney; and the present case is the first, that I am aware of, in which the Courts have been called on definitively to put a construction on the latter branch of this section. But, upon the whole, as we do not find in this attestation any words expressly declaring that the party

attesting was the attorney at the request of the party signing, we must say that the act of Parliament has not been complied with, and the rule to set aside this cognovit must therefore be made absolute, on the terms I have already mentioned.

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PARKE, B.—I am of the same opinion : and although I have hitherto entertained considerable doubt on this question, and have some little still, I think, upon the whole, the better course will be to follow the words of the act of Parliament, according to their common and ordinary construction. It appears to me, that in this section the legislature requires a definite thing to be done, namely, a subscribing of the name of the attorney to the due execution of the instrument, the mode of doing which is directed to be by a memorandum of attestation, in which he is both to declare himself the attorney of the party executing that instrument, and to state that he subscribes as such attorney. I agree that no precise form of words is rendered necessary for this purpose by the act ; but still those which are used must be such as will enable the Courts to collect both the facts which I have stated, namely, that the attesting attorney was present for the purpose of advising the defendant as to the nature and effect of the instrument, and that he attested it as such attorney. Between these two things there certainly is a difference ; for at the very moment of the execution of a cognovit or warrant of attorney, a man might come into the room and witness its execution, who had not previously been the attorney of the party in the way required by the statute, namely, by giving to that party the benefit of his professional advice. If any possible case can be put, shewing a distinction between the things required in these two clauses of this section, it is a sufficient foundation for our judgment ; and if even we could see none, inasmuch as the words of the statute embrace both cases, we ought to

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adhere to them. It is enough therefore for me to say at present, that as I cannot by necessary inference collect from the words used in this attestation, namely, that the attesting witness signed it "as attorney" for the party executing the cognovit, that he was the attorney acting for that party throughout the transaction, I think I am bound to hold this attestation insufficient. We ought not to presume that the legislature would make use of a redundant expression; and therefore as the language they have inserted in this section requires the attorney to declare in the attestation that he subscribes it for the party signing, as the attorney appointed in the manner required in the previous part of the section, we ought not to read the sentence as if it were a sufficient compliance with the enactment for him to say generally, that it is witnessed by him as attorney for that party.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

Nov. 25.

HEATH v. UNWIN.

To a declaration for the infringement of a patent, the defendant pleaded, that the nature of the invention and the manner in which it was performed were not particularly described in the specification; and also, that the invention

THIS was an action brought to recover damages for the infringement of a patent for certain improvements in the manufacture of iron and steel. The defendant pleaded, first, not guilty; secondly, that the plaintiff was not the first or true inventor of the improvement for which the letters patent were granted; thirdly, that the nature of the invention, and the manner in which the same was to be performed, were not nor are they particularly described or ascertained according to the true intent and meaning

was not new: and the objections delivered with the pleas under 5 & 6 Will. 4, c. 83, s. 5, stated, first, that the specification did not sufficiently describe the nature of the invention and the manner in which it was to be performed; and secondly, that the invention was not new, and had been wholly or in part used and made public before the obtaining of the letters patent:—*Held*, that the first of these objections was sufficient, but that the second was bad, and ought to have pointed out what portions of the alleged invention were previously in use.

of the said letters patent, in or by the specification in that behalf in the declaration mentioned; fourthly, that the said supposed invention was not at the time of making and granting the letters patent a new invention, but, on the contrary thereof, had been wholly and in part publicly and generally practised and used, and vended within that part of the United Kingdom of Great Britain and Ireland called England, before the date and grant of the letters patent; fifthly, that the defendant committed the supposed grievances by the leave and license of the plaintiff.

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The defendant, with the above pleas, delivered the following notice of objections, in pursuance of the statute 5 & 6 Will. 4, c. 83, s. 5: first, that the patentee was not the inventor of the improvements in respect of which the patent was alleged to be in force; secondly, that the specification and disclaimer in the declaration mentioned did not sufficiently describe the nature of the invention, and the manner in which it was to be performed; thirdly, that the invention did not produce the effect stated in the specification, nor was such effect produced by the plaintiff in the manner therein stated; fourthly, that the invention was not new, and was either wholly or in part used and made public before the obtaining the letters patent; fifthly, that the invention did not essentially differ from other similar inventions which were in public use at or before the granting of the said letters patent; sixthly, that the defendant had the plaintiff's leave and license to make use of the improvements for which the letters patent were granted.

Ogle having obtained a rule to shew cause why the defendant should not deliver a further and better particular of the objections intended to be relied on,

Martin now shewed cause.—By 5 & 6 Will. 4, c. 83,

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s. 5, it is enacted, "that in any action brought against any person for infringing any letters patent, the defendant, on pleading thereto, shall give to the plaintiff, and in any scire facias to repeal any letters patent the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action, and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively at such trial, unless he shall prove the objections stated in such notice." The object of that enactment was that the defendant should give notice to the plaintiff of the objections on which he bonâ fide intended to rely at the trial, in order that the plaintiff might come to trial prepared to meet them if he could. That purpose is sufficiently complied with by the present notice. It is no objection to the particulars that they are substantially the same as the pleas themselves: *Neilson v. Harford* (a). There *Parke*, B., in delivering the judgment of the Court, says, "The statute did not mean to say, nor do we think that the Court of Common Pleas [in the cases which had been cited (b)] meant to decide, that it would not be sufficient, in some cases, to give notice in the terms of the plea itself. The objection may be so completely and so fully expanded on the record, that a mere transcript of the plea itself may be sufficient; in other cases, the plea may be so general in its language, as to be insufficient as a notice, if transcribed from the plea merely. Each case must depend on its own peculiar circumstances." All that the statute requires is, that the defendant should state in intelligible language what the objections are. In *Fisher v. Dewick* (c), it was held not to be sufficient to say that the improvements, or *some of them*, had been used before, but that was because it was not sufficiently specific and intelligible, and the defend-

(a) 8 M. & M. 822.

(c) 4 Bing. N. C. 706; 6

(b) *Bulnois v. M'Kenzie*, and Scott, 597.

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ant ought to have pointed out which had been used before.

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Ogle, in support of the rule.—The case of *Bulnois v. Mackenzie* (a) is an express authority that the Court has power to order fuller and better particulars of objections to a patent, when those delivered do not comply with the requisitions of the statute. Here the objections delivered are a mere echo of the pleas. The second particular ought to have stated in what respect the specification was deficient in its description of the invention; and the fourth, instead of stating generally that the invention was not new, and was either wholly or in part used and made public before obtaining the letters patent, ought to have pointed out those parts which had been used and made public, and where they had been so used, to enable the plaintiff to make inquiry. *Fisher v. Dewick* is an express authority for that.

LORD ABINGER, C. B.—It appears to me, that as to one particular of objection, namely, the fourth, Mr. *Ogle* has brought it within the case in the Common Pleas, of *Fisher v. Dewick*, which decides that it is not sufficient to say that an alleged invention was *wholly or in part* made public before the obtaining the letters patent, but that it should be shewn what part was so used. I think, therefore, that the defendant ought to amend his fourth objection. But I see no objection to any of the rest; and with respect to the second, surely it is enough for the defendant to say that the specification does not properly set forth the invention. The legislature never intended that the defendant should argue his case in the statement of objections which he delivers in compli-

(a) 4 Bing. N. C. 127; 5 Scott, 419.

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PARKE, B., GURNEY, B., and ROLFE, B., concurred.

Rule absolute as regarded the fourth objection, and discharged as to the rest.

Nov. 25.

CHRISTIE v. RICHARDSON.

The words in the 6 Geo. 4, c. 50, s. 34, as to the costs of a special jury, that unless the Judge "shall immediately after the verdict certify, &c." mean that the Judge shall certify within a reasonable time after.

THIS cause was tried by a special jury obtained at the instance of the defendant, and at the trial a verdict was found for him, but no application was then made by him to the Judge to certify that the cause was a proper one to be tried by a special jury: but on the taxation of costs before the Master such a certificate was produced, (at what period it was obtained did not appear), and the Master accordingly allowed the costs of the special jury.

O' Malley now moved for a rule to shew cause why the Master should not review his taxation. By the stat. 6 Geo. 4, c. 50, s. 34, it is enacted "that the person or party who shall apply for a special jury shall pay the fees for striking such jury and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same, upon taxation of costs, than such person or party would be entitled unto in case the cause had been tried by a common jury, unless the Judge before whom the cause is tried shall, immediately after the verdict, certify, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury." In the case of *Waggett v. Shaw (a)*, which was a decision upon a

(a) 3 Camp. 316.

similar clause in the stat. 24 Geo. 2, c. 18, Lord *Ellenborough*, *Each. of Pleas*, C. J. held that a Judge could not certify for the costs of a special jury on the day after the trial. It is true, that in construing the stat. 3 & 4 Vict. c. 24, which enacts that when in certain actions therein named less than 40s. damages are given by the jury, the plaintiff shall have his costs, "unless the Judge or presiding officer shall immediately afterwards certify that the action was really brought to try a right, &c." the Courts have held that it is competent for the Judge to give such certificate in any reasonable time after the close of the trial: *Thompson v. Gibson (a)*, *Page v. Pearce (b)*; and the question is, whether these decisions can be considered as overruling *Waggett v. Shaw*.

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PER CURIAM.—We think that as the words in both acts are similar, they ought to receive a similar construction, and the Courts having held that the words, that the Judge shall certify immediately, may be construed to mean within a reasonable time, we ought to decide it to be so by analogy in the present case.

Rule refused.

(a) 8 M. & W. 281.

(b) Id. 677.

SANDFORD v. ALCOCK.

Nov. 25.

THIS was an action of detinue for six pieces of timber and a carriage. The cause was tried before Lord *Denman*, C. J., when the jury found a general verdict for the plaintiff, "damages £12, to be reduced to 1s. on giving up the timber and carriage." Some evidence was given at until the 23rd, and it was not served until four o'clock on the 24th:—*Held*, that as no fresh step could have been taken by the defendant, the plaintiff had not abandoned the order. A judge's direction as to the amendment of a *postea* cannot be questioned in the Court above, for there is no power to compel the production of his notes of the trial.

The plaintiff obtained an order to amend the *postea* at half-past nine o'clock on the 22nd of November, but did not draw it up

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the trial of the value of the timber, and to prove it to be worth £2, but there was contradictory evidence on this point, and no question was asked about, nor did the jury find, the value of the carriage separately. Early in this term a rule was obtained, on the authority of *Pawley v. Holly* (a) and *Cheyney's Case* (b), to set aside the verdict on the ground that the jury had not found the value of each article for which the action was brought. On the 19th of November, a summons was taken out returnable before Lord Denman, C. J., at half-past nine o'clock on the morning of the 22nd, to amend the postea, and an order was made by his lordship to distribute the damages, viz. £2 for the timber, and £4 for the carriage; but it was not drawn up until the 23rd, and not served until four o'clock on the 24th, the following day, being the last day of term.

Atkinson now moved to set that order aside, on two grounds.—First, Lord Denman had no authority to make this order, inasmuch as there was nothing on his lordship's notes to amend by. There was some evidence at the trial of the timber being worth £2, and that must therefore be taken to be its value; but there was no evidence as to what the value of the carriage was. [Lord Abinger, C. B.—The remainder must of course be the value of the carriage.] Not necessarily so. The residue of the damages, if not the whole, may have been given for the detention of the timber; and the legal inference is so. The order itself clearly shews the want of authority; for, by the order, the carriage is valued at £4, not at the residue, and there is still £6 of the sum given by the jury unaccounted for. The jury did not find any value; they only found damages. Secondly, the order ought to have been drawn up and served on the 22nd, or at the latest on the

(a) 2 W. Bla. 853.

(b) 10 Rep. 119 b.

23rd, and the plaintiff, by not serving it until four o'clock on the 24th, must be taken to have abandoned it. The authorities shew that the order ought to be drawn up "forthwith," otherwise it may be treated as waived; and whether any fresh step either has or could have been taken in the interim, is immaterial; for the rule is imperative, and the opposite party has a right to know within a reasonable time whether the rule would be drawn up or not: *Kenney v. Hutchinson (a)*.

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LORD ABINGER, C. B.—I think we ought not to hear an application to set aside an order to amend the postea. There can be no appeal to the Court to control a Judge's discretion as to such an amendment, for there is no power to compel a production of his notes. As to the other point, it is clear that the defendant could not have taken any fresh step; and therefore I think the plaintiff ought not to be considered as having abandoned the order.

PARKE, B., GURNEY, B., and ROLFE, B. concurred.

Rule refused.

(a) 6 M. & W. 134.

REGINA v. AUSTIN.

IN the year 1826, a writ of immediate extent issued against the defendant, who was a bankrupt, under which a levy was made. A sum of money having recently come into the hands of the Accountant-general in bankruptcy as part of the bankrupt's estate, a second extent was issued, money was in the hands of the Accountant-general in bankruptcy, the Court made an order absolute for the sheriff to pay over the money, but refused to make the Accountant-general in Bankruptcy a party to the order. The sheriff having applied to the Court of Review for an order for the Accountant-general in bankruptcy to pay over the money to him, the order was refused, on the ground that the sheriff had no locus standi in that Court. This Court afterwards discharged the common order on the sheriff.

The sheriff having returned to an extent that he had seized money into the hands of the Queen, and it appearing that the

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directed to the sheriffs of London, to which they returned that they had found money belonging to the defendant in the hands of the Accountant-general of the Court of Bankruptcy, which money "they had seized into the hands of our Lady the Queen."

In Michaelmas Term, 1841, *Jervis* moved for an order that the sheriffs of London and the Accountant-general in bankruptcy should pay over the money to the sureties to the Crown. The application was made upon an affidavit of the above facts, and that notice of the motion had been duly served. It was admitted that the ordinary course was to apply for an order upon the sheriffs only, but as the money was not in their possession, but in the hands of the Accountant-general in bankruptcy, whom the sheriffs had no means of compelling to pay it over, he should be made a party to the rule. [*Rolfe*, B.—Is not your remedy by application to the Court of Bankruptcy? There surely must have been cases in the Court of Chancery with respect to the Accountant-general there. *Parke*, B.—How can you make the Accountant-general in bankruptcy a party to the suit? Suppose the money had been received by a third person, it would then constitute a debt which must be recovered in the ordinary way by scire facias. The Accountant-general is not an officer of this Court, and I do not see how we can make an order upon a person who is not an officer of this Court. You had better take an order upon the sheriff only.]

Lord ABINGER, C. B.—Take an order absolute upon the sheriffs, and then they may apply to the Court of Bankruptcy.

The common order was accordingly made upon the sheriffs, dated the 18th of November, 1841, and thereupon they petitioned the Court of Bankruptcy that the money should be paid out of the hands of the Accountant-gene-

ral in bankruptcy to the sheriffs, for the use of the Crown. The Judge of the Court of Bankruptcy made an order accordingly, and the bankrupt's assignees then petitioned the Lord Chancellor for an order to review the decision of the Judge in bankruptcy. The matter was again heard in the Court of Review, and on such re-hearing the learned Judge rescinded the former order, on the ground that the sheriffs had no locus standi in the Court of Review.

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On the 25th of November, 1841, a rule was obtained in this Court by the sheriffs, calling upon the defendants to shew cause why the order of the 18th of November should not be discharged; and in Michaelmas Term, 1842, *W. H. Watson* obtained a rule to shew cause why that rule should not be made absolute, and why the sheriffs should not be at liberty to amend their return. Against the latter rule

Jervis now shewed cause.—There are two modes by which the Crown obtains possession of the debts or chattels of its debtors; the one is, where the sheriff returns that the debtor is possessed of certain goods which he the sheriff has seized into the hands of the Crown; or the sheriff may return that a third party has possession of the goods, so as to enable the Crown to issue a scire facias. In the present case the sheriffs have created the difficulty, by their informal return. It was found by the inquisition that the money was in the hands of the Accountant-general in bankruptcy, and therefore they should not have returned that they had seized the money absolutely.

Watson, contra, was not called upon.

LORD ABINGER, C. B.—I think the rule ought to be made absolute for the discharge of the common order.

Rule absolute to discharge the common
order of the 18th of November, 1841.

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VACATION SITTINGS AFTER MICHAELMAS TERM.

Dec. 3.

COOPER v. ROBINSON and Another.

In replevin, the defendant made cognizance for half a year's rent due at Michaelmas, 1841, for a farm held by the plaintiff under J. H. at a rent of 86*l.*, payable half-yearly at Lady-day and Michaelmas: the plaintiff pleaded in bar, that by an indenture made between J. H. and the plaintiff, purporting to be made on the 1st of Feb. 1841, but which was in fact made after Michaelmas, 1841, and after the rent became due, J. H. released the plaintiff from the rent. The replication set out the indenture, which bore date 1st Feb., 1841, and was a lease from J. H. to the plaintiff of the farm, to hold from 30th July, 1840, for fourteen years, at a rent of 86*l.* payable half-yearly at Lady-day and Michaelmas, the first payment to be made at Lady-day *next*:—*Held*, that this was no release of the rent for which the cognizance was made.

REPLEVIN.—The defendants made cognizance as the bailiffs of one John Heaton, and alleged that the plaintiff was tenant to Heaton of a farm and lands, at a rent of 86*l.*, payable half-yearly on the 25th of March and the 29th of September, and that the defendants distrained for half a year's rent ending the 29th of September, 1841.

Plea in bar, that after the said rent had become due to the said John Heaton as in the cognizance mentioned, before the said time when &c., by a certain indenture made between the said John Heaton and the plaintiff, to wit, on the 18th of November, 1841, and purporting to be made on the 1st of February, 1841, but which was in fact made after the 29th of September, 1841, and after the said rent had become due and payable [profert], the said John Heaton released the plaintiff from the said rent which had so become due, and the payment thereof. Verification.

The replication set out the indenture in hæc verba. It bore date the 1st of February, 1841, and was a lease from John Heaton to the plaintiff of a messuage and lands, to hold from the 30th of July, 1840, for the term of fourteen years, at a rent of 86*l.*, payable half-yearly on the 25th of March and 29th of September, the first payment to begin and be made "on the 25th of March *next*." The replication then averred, that the said rent in the cognizance mentioned was and is rent which became due after the 25th day of

was and is rent which became due after the 25th day of

March next after the said 1st day of February, 1841, that is to say, on the 29th day of September, 1841, as in the cognizance alleged. Verification.

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Special demurrer, on the ground (*inter alia*), that the replication has not in any way denied the release stated in the plea in bar; it therefore admits such release, and that the plaintiff is entitled to maintain his action.—Joinder in demurrer.

Jervis, in support of the demurrer.—The replication is informal in several respects; but the defendants will probably contend that the plea in bar is bad. The question is, whether the deed set out in the replication, coupling it with the averments in the plea, operates as a release of the rent. It is submitted that the deed took effect only from the day of its *actual* execution, which was subsequent to the 29th September, 1841, and therefore the effect was that the plaintiff was released from the payment of rent from July, 1840, until the 25th March next after the execution of the lease, that is, the 25th March, 1842. [*Parke*, B.—But what is there to exempt him from payment, under a former contract antecedent to the deed, of rent due before the 25th March?] The lease is in operation from the 30th July, 1840.

Hayes, *contra*.—The cognizance does not claim the rent under the lease set out in the replication, but under a previous contract of tenancy. A demise to the plaintiff is admitted by the plea in bar. It is agreed that a deed has no operation but from the time of its execution; *Clayton's case* (a), *Oshey v. Hicks* (b), *Steele v. Mart* (c), *Shep. Touch.* 108: this deed therefore took effect from the time of its actual delivery, which was subsequent to the time at which the rent in question became due. How could it have any operation to confer on the tenant a title to the land rent free for the time past? The statement of a term

(a) 5 Rep. 1.

(b) Cro. Jac. 263.

(c) 4 B. & Cr. 272.

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of fourteen years from the 30th July, 1840, is merely by way of computation of the subsequent period for which the lease is to run.

PARKE, B.—There is nothing to exempt the plaintiff from the payment, under a previous contract, of rent due before the execution of the indenture. The “term” in the lease only designates the time for which it is to run, by way of calculation, not as conveying any interest. It is but a different way of saying that it is a term for twelve years and eight months to come. It is clear the deed does not operate to release the plaintiff from the liability, under the demise which is admitted by the plea in bar, to pay a rent of 86*l.* half-yearly. The judgment must be for the defendants.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the defendants.

Dec. 6.

WHITEHEAD and Others, Assignees of Richard BENBOW,
a Bankrupt, v. WALKER.

The indorsee of an overdue bill or note takes it subject to all the equities arising out of the bill or note transaction itself, but not subject to any collateral claim existing between the earlier parties to it. Therefore, to an action by the indorsee of an overdue note against the payee, a distinct debt due to the payee from a former indorsee cannot be set off.

ASSUMPSIT by the assignees of the indorsee against the indorser of a bill of exchange. The declaration stated, that on the 8th of August, 1834, and before the bankruptcy of Benbow, certain persons made their bill of exchange in writing, directed to Grayhurst & Co., and payable to the defendant; that the defendant indorsed the bill to W. Swainson, who indorsed it to Willis & Swainson, who indorsed it to Benbow before his bankruptcy. Averment, that Grayhurst & Co. refused to accept the bill, and that the same was protested, &c. (a).

(a) See the former case of *Whitehead v. Walker*, 9 M. & W. 506.

Plea, that after the indorsement of the bill to Willis & Swainson, and before and at the time when it was indorsed by them to Benbow, Willis & Swainson were, and still are, indebted to the defendant in certain large sums of money, amounting in the whole to £1000, in respect of certain bills of exchange, &c., goods sold and delivered, &c. &c. Averment, that the said sums so due from Willis & Swainson to the defendant exceeded the amount of the said bill of exchange; of all which premises Benbow, at the time of the said indorsement thereof to him by Willis & Swainson, had notice; and that the said bill was indorsed by them to Benbow, after it had so been so refused acceptance and had been protested as in the declaration mentioned, and after it had become due. Verification.

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Replication, *de injuriâ*.

Special demurrer, and joinder therein.

Bovill, in support of the demurrer.—First, the replication is clearly bad, for the plea consists not of matter of excuse, but of matter which goes in discharge or extinguishment of the defendant's liability upon the bill. It will be said, however, that the plea is bad in substance, and affords no answer to the action, on the authority of *Burrough v. Moss* (a). But a party who takes a bill of exchange after it is due, takes it with all its equities, both direct and collateral. And it was expressly held by *Coleridge, J.*, in *Goodall v. Ray* (b), that a party who takes a promissory note from the payee, with a knowledge that the payee is indebted to the maker in a larger amount, cannot recover upon the note against the maker. That case is strictly in point for the defendant.

Crompton, *contra*, was stopped by the Court.

PARKER, B.—It is unnecessary to determine whether the

(a) 10 B. & C. 558.

(b) 4 Dowl. P. C. 76.

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replication is good or not, for we think the plea is bad in substance, on the authority of *Burrough v. Moss*. That case decides, that the indorsee of an overdue promissory note takes it, as against the maker, with all the equities arising out of the note transaction itself, but not subject to a set-off in respect of a debt due from the indorser to the maker of the note, arising out of collateral matters. For example, if the note be released or discharged, the plaintiff under such circumstances cannot make a title to it. But a set-off is not an equity; it is a mere collateral matter; it is a right to set off a cross demand against the plaintiff's cause of action, which was introduced to prevent a multiplicity of actions. The case of *Burrough v. Moss* is good law, and has been recognised in this Court. Nor do I think that case is affected by the decision of *Coleridge, J.*, in *Goodall v. Ray*. It seems to me that either there must be some inaccuracy in the report, or there must have been in that case that sort of formal notice to the plaintiff which is equivalent to an agreement to set off the cross demand as against him. On that ground the case may perhaps be supported; otherwise I cannot assent to the position, that a mere notice of a set-off between the payee and the maker can operate to restrict the negotiability of a promissory note. Besides, the decision of the point was unnecessary in that case, inasmuch as the plaintiff's demand was for a sum less than the amount of the note. I cannot, therefore, consider that case as an authority that mere notice of the set-off makes any difference. Our judgment must be for the plaintiffs.

ALDERSON, B.—I am of the same opinion. If the doctrine advanced on the defendant's part were correct, no one would be able to tell whether certain instruments were negotiable or not; for their negotiability would depend on the will of a third person. No one could tell whether the maker would set off his claim against the prior

party or not: if he will not, the note is negotiable, otherwise it is not. *Burrough v. Moss* lays down the true rule, that the indorsee of an overdue bill is subject to those equities, and those only, which affect the bill itself.

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GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiffs.

ENGLAND v. WALL.

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TRESPASS quare clausum fregit. Plea, that long before and at the said time when &c., the defendant was, and from thence hitherto hath been, and still is, occupier of a certain close with the appurtenances, called W., near the said close in the declaration mentioned, in which &c.: and that the defendant, while he was such occupier, and all the occupiers of the said close called W., have for and during the whole period of twenty years next before the commencement of this suit used and enjoyed as of right a certain carriage and drift way from &c. over and along the said close of the plaintiff in which, unto and into the said close called W., &c., for any agricultural purpose:—justifying the trespasses in the use of that way.

Replication, that long before the said period of twenty years in the plea mentioned, one W. C. was seised in his demesne as of fee, as well of the said close in which &c. as of the said other close called W.; and that the said W. C. continued to be so seised of the said closes respectively for and during part of the said period of the twenty years in the plea mentioned, to wit, until and upon the 10th day of

In trespass qu. cl. freg., to a plea of enjoyment of a right of way over the plaintiff's close, by the occupiers of a close called W., for twenty years next before the commencement of the suit, under the stat. 2 & 3 Will. 4, c. 71, s. 2, the plaintiff replied, that before the period of twenty years mentioned in the plea, one W. C. was seised in fee, as well of the close mentioned in the declaration as of the close called W., and continued so seised during part of the said period of twenty years, to wit, until &c., when

he died so seised:—*Held* bad on special demurrer; for that unity of *seisin* was not inconsistent with the right as alleged in the plea, and unity of *possession* (if that were meant by the replication) might have been given in evidence under a traverse of the right as alleged in the plea.

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February, 1823, when the said W. C. died so seised as aforesaid.—Verification.

Special demurrer, assigning for causes, that the allegation made in the replication, that W. C. was seised in fee, must be held to imply, until the contrary be shewn, that the said W. C. was the occupier of both the closes, and therefore the replication amounts to an allegation of unity of possession, which is a matter of evidence that might have been proved to negative user as of right, under a traverse of such user; or it is, at least, doubtful and uncertain whether the plaintiff intends to rely on the replication as so alleging a unity of possession, or as setting up a matter which the proviso at the end of the fifth section of the stat. 2 & 3 Will. 4, c. 71, requires to be replied, and that, under that proviso, the matter replied is not sufficient, and does not negative the possible validity of such a right as is claimed by the plea.

Joinder in demurrer.

The following additional point was noted in the margin, on the part of the plaintiff:—That the replication is bad on general demurrer, on the ground that, notwithstanding an unity of seisin of the fee, such a right of way may exist as is claimed in the plea, and that the replication should have stated further matters to negative the existence of the right, as it is not sufficient to allege one matter alone, which may or may not negative the right, accordingly as it may or may not be combined with other matters not alleged.

Hayward, in support of the demurrer.—The question in this case arises upon the fifth section of the Prescription Act, 2 & 3 Will. 4, c. 71. And upon the established construction of that section, this replication is clearly bad, in whatever way it be read. If it be taken to allege a unity of *seisin* in W. C., in the strict sense of the words, it affords no answer to the plea, because it is consistent with that

allegation that the defendant may have acquired an easement as against the owner of the fee. On the other hand, if it mean a unity of *possession* merely, then, although it affords an answer to the plea, it is bad in form, as amounting to an argumentative traverse of the defendant's user as of right. [*Parke, B.*—Unity of seisin may be without possession; if coupled with possession, then it is evidence to support a traverse of the way claimed.]—The Court then called on

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Tomlinson, contra.—The replication is good. It confesses the defendant's enjoyment, and does not imply a unity of *possession* on the part of W. C. The plea alleges a user of the way for *twenty years*; that must be taken to be admitted by the replication; and then unity of seisin is an answer, by shewing that the enjoyment was not good for that period, as against the owner of the fee. *Kinloch v. Nevile (a)* is an authority to shew that this is matter which ought to be specially replied. It must be assumed that the defendant relies on a *modern* right, and this the replication disposes of, by shewing that it was not available as against the owner of the fee. If, indeed, the plaintiff were bound to get rid of every supposable right of way, it must be admitted that the replication could not be supported; but the defendant, under his plea, can give in evidence a modern right of enjoyment only. It cannot be contended that the plaintiff is bound to afford an answer to an enjoyment for *forty* years. If the defendant meant to rely on an enjoyment as of right for a longer period than twenty years, he ought to plead accordingly. It is sufficient in the first instance for the plaintiff to answer a modern right, leaving the defendant to rejoin a more ancient right, if it exist. He then cited and referred to the following authorities:—*Vin. Abr., Extinguishment, A. to C.,*

(a) 6 M. & W. 795.

Exch. of Pleas, *Bright v. Walker* (a), *Buckby v. Coles* (b), *Whalley v. 1842. Thompson* (c), *Holmes v. Goring* (d), *Barlow v. Rhodes* (e),
 ENGLAND *James v. Plant* (f), *Tickle v. Brown* (g), *Bailey v. Apple-*
 v. *yard* (h).
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Hayward, in reply.—The 5th section of the statute empowers a party to allege the enjoyment of an easement as of right, for such period as shall apply to his case; and as the defendant might under his plea give evidence of more than one kind of easement,—as for instance, an easement by prescription,—the plea is not answered by a replication which applies to one species of easement only, namely, a *modern* right of way. Besides, the right of way claimed in the plea is consistent with the unity of seisin alleged in the replication. Further, it may well be contended that the proper construction of the replication is, that W. C. was not merely seised but actually possessed of the two closes during part of the twenty years. In *Stott v. Stott* (i), it is laid down that an allegation of *seisin* *prima facie* implies *occupation*, unless the contrary be shewn in pleading. The replication is therefore an argumentative denial of the defendant's possession during the twenty years. [*Parke*, B. —The argument on the part of the plaintiff is, that the replication confesses an enjoyment in fact, but shews that it was not good as against the owner of the fee.] It ought to have confessed an enjoyment *as of right*—that is, an *apparently* rightful enjoyment, and to have got rid of it by shewing that it arose from permission, or the like. It may be that a good answer might have founded upon the seisin of W. C., if the requisite allegations had been added; as, for instance, that the defendant's user was

(a) 1 C., M. & R. 211.

(b) 5 Taunt. 311.

(c) 1 Bos. & P. 371.

(d) 2 Bing. 76; 9 Moore, 166.

(e) 1 C. & M. 439.

(f) 4 Ad. & E. 749; 6 N. & M. 282.

(g) 4 Ad. & E. 369; 6 N. & M. 230.

(h) 9 Ad. & E. 161; 3 N. & P. 257.

(i) 16 East, 343.

under a license from him ; but no such fact appears in this replication. *Esch. of Pleas,*
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PER CURIAM.—If it be a seisin with possession, that is evidence under a traverse of the right as alleged in the plea. The plaintiff had better amend his replication.

Leave to amend accordingly, on payment of costs ; otherwise

Judgment for the defendant.

HIGGINS v. GREEN and Another, Esqs.

Dec. 6.

THIS was an action of trover against the defendants, justices of the town of Bedford, for issuing warrants of distress, under which the plaintiff's goods were taken, for nonpayment of rates. The following case was stated by consent of the parties, for the opinion of this Court.

By a local act for the improvement of the town of Bedford, (43 Geo. 3, c. cxxviii), the commissioners therein mentioned were invested (by s. 37) with all

By a local act of the 43 Geo. 3, c. cxxviii (a), for improv-

the powers, provisions, and authorities, and were to be in the receipt and possession of all compositions, rates, &c. granted by the 13 Geo. 3, c. 78, and the surveyors to be appointed by the commissioners were to have the same powers of demanding, collecting, and recovering payment of such compositions &c. as under that act. By s. 39, the then surveyors of the highways within the ambit of the act were, on a day to be appointed by the commissioners, to produce to them their accounts, and to pay over all balances in their hands to the treasurer of the commissioners, and thenceforward their office was to be determined. By s. 50, the commissioners were empowered, in order to raise money for carrying the purposes of the act into execution, to lay one or more rates once in every year, or oftener if necessary, on all houses, shops, &c. within the town, so as such rates should not exceed 8*d.* in the pound in a year on their yearly value. By a subsequent act, 50 Geo. 3, c. lxxxii, reciting that the commissioners had borrowed considerable sums of money on the rates, and that they were inadequate to the purposes of the act, the power of rating houses, shops, &c. was extended from 8*d.* to 1*s.* in the pound in the year.

Held, that the commissioners had no power, in case the rates so levied proved insufficient for the purpose of the act, to levy a subsidiary rate by application to be made to the justices by the surveyor, under the 13 Geo. 3, c. 78, s. 45.

(a) The following sections are material to the case. Sect. 37 enacts, that the commissioners shall be invested with all and singular the powers, provisions, and authorities, and in the receipt and possession of all compositions, rates, assessments, fines, and penalties, given and granted in and by the 13 Geo. 3, c. 78, or any act of Parliament

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ing the town of Bedford, &c., certain commissioners were appointed for carrying the acts into execution: and another act of the 50 Geo. 3, c. lxxxii, for amending the above act, was subsequently passed. In February, 1840, the surveyor appointed by the commissioners applied to the justices of the town of Bedford, and required them to make a highway rate for the five parishes of which the town is composed.

passed for explaining, amending, or altering the said act; and that the surveyor or surveyors to be by the said commissioners appointed by virtue of this act, shall have the same powers of demanding, collecting, and recovering the payment of such compositions, &c., as by the said acts are in that respect given to the surveyors of highways appointed by virtue thereof; which compositions, &c., shall be applied to the several purposes to which the same are applicable under the said acts, and not otherwise.

Sect. 39 directs, that the then surveyors of the highways shall, on a day to be appointed by the commissioners, produce to them their accounts for the highways from the time of their entering into office to that day, and pay over balances in their hands to the treasurer of the commissioners, and that thenceforward the office of surveyor of the highways (within the ambit of the act) shall be determined.

Sect. 50 enacts, that for raising money to enable the commissioners to carry the purposes of the act into execution, one or more rate or rates, assessment or assessments, shall be laid and assessed by the commissioners once in every year, or oftener if they shall judge it needful, upon all messuages, houses,

shops, warehouses, buildings, yards, and gardens, situate within the several parishes of &c., in the said town of Bedford, in such sum or sums of money as the said commissioners shall order and direct, but so nevertheless as that such rate or rates, assessment or assessments, do not exceed in the whole, in any one year, the sum of 8*d.* in the pound, according to the yearly rent or value of such messuages, &c. And sect. 59 empowers them in like manner to lay a rate, not exceeding 1*s.* in the pound, on halls, gaols, chapels, and other public buildings, &c.

The 50 Geo. 3, c. lxxxii,—after reciting, in sect. 1, the power of the commissioners under the former act to lay rates not exceeding 8*d.* in the pound in any one year, that they had from time to time borrowed considerable sums of money on the credit of the rates, which still remained due, and that the rates, and the sums allowed to be borrowed on the credit of them, were inadequate to the purposes to which by the act they were applicable,—extends, by s. 2, the power of laying rates on messuages, houses, &c. from 8*d.* to 1*s.* in the pound, and upon halls, gaols, chapels, &c., from 1*s.* to 1*s.* 6*d.* in the pound.

The application was made under the 37th section of the local act, which, it was contended, incorporated the provisions of the 13 Geo. 3, c. 78. It was proved to the satisfaction of the justices, under the provisions of the 45th section of the 13 Geo. 3, c. 78, that the highways of the town could not be sufficiently repaired by the means prescribed by the 13 Geo. 3, c. 78; whereupon they ordered that a rate not exceeding fourpence in the pound should be made by the surveyor, and allowed by one justice of the peace, and, when collected by the surveyor, should be applied to the repair of the highways. A rate was thereupon made, and signed and allowed by two justices. This rate was made in addition to the rates made by the commissioners, and was co-existent with them. The plaintiff was rated under both rates; under the former in respect of property rateable under the Highway Act, and under the latter in respect of property rateable only by the local act; and having refused to pay the above rates, was distrained upon by a warrant by the defendants.

The questions for the opinion of this Court are, whether, since the passing of the General Highway Act, 5 & 6 Will. 4, c. 50, which repeals the 13 Geo. 3, c. 78, a rate or assessment may be made in pursuance of the 37th section of the local act: and secondly, whether the rate made by the justices is a valid rate. If the Court shall be of opinion in favour of the plaintiff, judgment is to be entered by confession for him, with 40s. damages and costs: if the Court shall be of opinion in favour of the defendants, judgment of *nolle prosequi* is to be entered against the plaintiff, with costs.

Byles, for the plaintiff.—The question in this case is, whether a subsidiary rate, in addition to that levied by the order of the commissioners under the local acts, can be made by order of the justices under the 45th section of the

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13 Geo. 3, c. 78. It is clear, that by the first local act, the 43 Geo. 3, c. cxxviii, it was intended that all the machinery for the levying of highway rates under the 13 Geo. 3, c. 78, should be superseded, as to the town of Bedford, and an altogether new rate substituted: but it is contended on behalf of the defendants, that under the 37th section of that act, the justices have an additional power to make a highway rate by the surveyors. But no power whatever is in terms given by that clause, either to the commissioners or to the surveyor, to *make* a rate; but only to the surveyor the same powers to recover payment, and to the commissioners the same powers as to the receipt and possession of the rates, as were contained in the 13 Geo. 3, c. 78. Where the legislature intended to give the power of taxation, they have done it in express words, as in the 50th section, whereby the commissioners were empowered to assess one or more rates once a year upon all messuages &c. in the town of Bedford, so that the rates did not exceed in one whole year the sum of 8*d.* in the pound. It is clear the legislature meant that the commissioners should have jurisdiction to levy rates only to the extent of 8*d.* in the pound in the year. But according to the construction put by the defendants on the statute, rates to an unlimited extent might be raised. Could the legislature have intended that there should be two co-existing rates? Who can determine how much of the expenses is to be paid out of each?—The Court then called upon

Gunning, *contra*.—This rate is made under an authority compounded of the two acts of Parliament, the 13 Geo. 3, c. 78, and the local act of 43 Geo. 3: the power being given by the latter, and the rate directed to be made under the former. The commissioners are first empowered to raise rates to the amount of 8*d.* in the year on houses and other property situate in the town; but the

legislature thought this sum might not be sufficient, and therefore empowered them also, when they had exhausted this species of property, to go to another, lying out of the town properly so called, and make a highway rate. That authority is deducible from the 37th and 50th clauses of the local act, taken in connexion with the 45th section of the 13 Geo. 3, c. 78. Undoubtedly, the 37th section does not in express terms give the power to make a highway rate; but it invests the commissioners and the surveyor with all the "powers, provisions, and authorities" of the 13 Geo. 3, c. 78. Of course, they must satisfy the justices on oath that a greater sum is required than the 8*d.* in the pound. [*Alderson, B.*—Why may not the 37th section have its natural meaning, being confined to the collection of rates previously made? There might be arrears of rates remaining due after the accounts of the surveyors were brought in under s. 39. That construction would give full effect to every word of the 37th section.]

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PARKER, B.—It appears to me to be very clear that the commissioners had no power to cause this rate to be made, by application to the justices. The argument of *Mr. Byles* is unanswerable, that the financial clauses of the act of the 43 Geo. 3 are confined to the 50th and 37th sections, neither of which confers any such power. The 50th is the only section which expressly gives the commissioners the power of raising money: and that enables them to make rates upon certain property, which shall not exceed 8*d.* in the pound in any one year. The subsequent sections are explanatory of the mode in which those rates shall be raised. The only argument which can be urged in favour of the validity of the present rate is founded on the 37th section, which, it is said, gives the commissioners a subsidiary and contingent power, with the assistance of the justices, to levy a highway rate according to the acts then in force, if the other rate should prove insufficient. If such

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were the intention of the legislature, it ought to have been expressed in clear and unequivocal terms: but this section gives in terms no power to the commissioners to make a rate, or to apply to the justices to make one. The clause is not very happily expressed, but it may be reasonably construed by applying it to the collection of arrears of rates, not collected at the time of bringing in the surveyors' accounts under s. 39.

ALDERSON, B.—I am of the same opinion. The power of rating given by the 50th section of the local act is a limited one: if any power of raising a subsidiary rate had been given, the natural place in which to find it would be after that section, and not before: and for that purpose very clear and express terms ought to be used; whereas no such power is expressly given at all. The general Highway Act contains a mode of recovering antecedent rates, as well as fines and penalties; and by supposing the "powers, provisions, and authorities" mentioned in the 37th section to refer to these objects, we may give full effect to the intention of the legislature. Why, then, are we to say that they meant to give, in the same act, a limited and unlimited power of taxation? Again, it appears very strange, if the defendants are right, that the subsequent local act, 50 Geo. 3, c. lxxii, makes no mention whatever of this subsidiary power. That act recites that the commissioners are in debt, and authorizes them, instead of the 8*d.* rate, to raise a rate of 1*s.* and 1*s.* 6*d.*, but it contains no recital of the existence of any such subsidiary power as is now contended for. It is impossible but that it should have done so, if such a power had then existed.

GURNEY, B., concurred.

ROLFE, B.—The recital of the act of the 50 Geo. 3, appears to me to settle the question. It recites that a

rate of 8*d.* in the pound may be levied, and enables the commissioners to raise it to 1*s.* and 1*s.* 6*d.*, and yet says nothing as to the power of making additional rates, which, according to the defendants, the commissioners always possessed. Can it be imagined that there was behindhand an unlimited power to double or treble the 8*d.* rate? It is impossible to suppose so.

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Judgment for the plaintiff.

FRUSHER v. LEE and Another.

Dec. 7.

CASE for an irregular distress. The fourth count of the declaration charged the defendants with selling the plaintiff's hay and straw under improper conditions and restrictions of sale, and for less than the best prices that could have been obtained. Plea, not guilty. At the trial before *Alderson*, B., at the last assizes at Norwich, it appeared that the hay and straw had been sold subject to a condition that they should be consumed upon the land according to the custom of the country, and it was alleged that they had in consequence fetched inferior prices. Evidence was given for the defendant to shew that such was the custom of the country in the neighbourhood where the lands lay; and *Abbey v. Petch* (a) was cited as an authority that the landlord had a right to impose such a condition. The learned Judge, in summing up, left it to the jury to say whether, according to the custom of the country, the hay and straw could not be removed from the premises; and if so, whether, under those circumstances, the goods were sold for the best price. The jury found that such was the custom, but that the goods, being sold subject to that condition, did not fetch

Quære, whether a landlord, who has seized his tenant's hay and straw under a distress for rent, may sell it subject to a condition that the purchaser shall consume it on the premises, according to the custom of the country.

(a) 8 M. & W. 419.

Exch. of Pleas, 1842. the best price; and upon the whole case, they gave a verdict for plaintiff, damages £51.

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In Michaelmas Term, *B. Andrews* obtained a rule nisi for a new trial, on the ground of misdirection: against which

Kelly now shewed cause, and contended that the case of *Abbey v. Petch* could not be supported: if it were law, the consequence would be that the landlord would have the power of authorizing any number of persons to come upon the land, for depasturing the hay and straw, during the occupation of the tenant. [*Parke, B.*—There are two conflicting authorities on this subject. In a case of *Jones v. Hamp (a)*, *Patteson, J.*, had ruled at Nisi Prius that the landlord had no right to convey such a condition to the sale. *Mr. Richards* moved for a new trial against that ruling, in this Court, on the 25th of April, 1840, and the rule was refused on that point. That case was not referred to in *Abbey v. Petch*. It must therefore still be considered as a disputed question. *Alderson, B.*—I certainly was much impressed with *Mr. Kelly's* argument at the trial, against the decision in *Abbey v. Petch*.]

The case was then discussed on other points, which do not call for a report, and ultimately the rule was

Discharged.

(a) Not reported.

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STEWART, Public Officer of the East of England Bank, &c.
v. GREAVES and Others.

Dec. 9.

ASSUMPSIT for money lent, money paid, money had and received, and upon an account stated.

Second plea, that the said causes of action accrued against a certain co-partnership, called "The Southern District Banking Company," established under the 7 Geo. 4, c. 46, and not otherwise, of which said co-partnership the defendants, at the time of the accruing of the causes of action, were members; that the said causes of action accrued against the defendants as such members, and not otherwise; that one S. Bovill and one W. Dunn had been duly appointed and registered pursuant to the said statute, as public officers of the said co-partnership, to sue and be sued for and on behalf of the same, according to the statute, and the said persons so being, and being duly nominated and appointed and registered as such public officers at the time of the commencement of this suit, were living and resident in England, and within the jurisdiction of this Court at the commencement of this suit.—Verification.

Third plea, that the said causes of action accrued against the said co-partnership called "The Southern District Banking Company," of which, at the accruing of the said causes of action, the said defendants were members jointly

The creditor of a banking co-partnership, established and carrying on business under the stat. 7 Geo. 4, c. 46, cannot sue an individual member of the company for his debt, but must proceed against the public officer, pursuant to the 9th section of that act:—at least, where it appears that there is a public officer, and that he is within the jurisdiction.

Therefore, a plea to an action against an individual member of the company, which stated that the causes of action accrued against a certain banking copartnership established under the 7 Geo. 4, c. 46, and not other-

wise, of which copartnership the defendant was a member; that the causes of action accrued against the defendant as such member and not otherwise; that S. B. and W. D. had been duly appointed and registered pursuant to the statute, as public officers of the copartnership, to sue and be sued on behalf of the same, and that the said persons, so being, and being duly nominated and appointed and registered as such public officers, at the time of the commencement of the suit, were living and resident in England, and within the jurisdiction of the Court,—was held a good answer to the action.

Such a plea is properly pleaded in bar, and not in abatement.

Held, also, that the plea was not bad as amounting to an argumentative denial of the contract, for that it admitted that the defendant contracted, but avoided the effect of that admission by the statutable exemption from an action in his favour:—that the plea need not state that the public officers were nominated while the company carried on the business of banking, by issuing notes, &c.; or that the causes of action did not arise against the defendant in his character as a banker.

Held, also, that the plea, taking it altogether, sufficiently alleged that the two persons therein mentioned actually were public officers of the company.

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with one J. W. Gilbart and J. A. Batho, and who, at &c., were resident in England, and the said causes of action accrued against the said defendants jointly with the said J. W. Gilbart and J. A. Batho, and not against the said defendants alone; that the said J. W. Gilbart and J. A. Batho, before, and at &c., were and from thence hitherto have been and still are, members and co-partners of and in the said co-partnership in the declaration mentioned, called "The East of England Bank," and that the said plaintiff sues as such public officer of such bank, and as the nominal plaintiff on behalf of the members of the said East of England Bank, and amongst others, of the said J. W. Gilbart and J. A. Batho.—Verification.

Special demurrer to the second and third pleas, assigning for causes :—To the second plea,—first, that the act of Parliament does not preclude the plaintiff from suing the said defendants as he has done, and that it is not obligatory on him to bring his action against one of the public officers; secondly, that the plea is a plea in bar, and the objection stated in the plea can only be taken on a plea in abatement; thirdly, that the plea is an argumentative denial of the existence of the causes of action in the declaration, and amounts to non assumpsit, and that it does not traverse nor confess and avoid the causes of action; fourthly, that it does not appear by the said plea, that Bovill and Dunn ever were public officers of the co-partnership, whilst the co-partnership were carrying on business under the said act; fifthly, that it does not appear by the said plea, that the cause of action accrued against the co-partnership of persons, in respect of any matters connected with a trading under the provisions of the said act; and that it is consistent with the allegations in the plea, that although the causes of action accrued against the co-partnership of persons, yet that the causes of action against such persons accrued in respect of matters wholly unconnected with the business of banking, or any trading or business contemplated by the said act; sixthly,

that the plea does not expressly aver that Bovill and Dunn were, at the time of the commencement of the suit, public officers of the co-partnership, but it is consistent with it that they might have been public officers of the co-partnership, but had ceased to be such.—The third plea was also demurred to, on the ground that although Gilbert and Batho were members of the co-partnership mentioned in the plea, yet that plea did not shew any grounds for absolving the defendants from liability.

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Joinder in demurrer.

The case was argued on a former day of these sittings (Dec. 8), by

Butt, for the plaintiff.—The main question in this case is, whether the 9th section of the Banking Co-partnership Act, 7 Geo. 4, c. 46, which provides, that all actions and suits, &c. to be commenced or instituted by any persons against such co-partnership, “shall and lawfully may” be commenced, instituted, and prosecuted against any one or more of the public officers for the time being of the co-partnership, as the nominal defendant or defendants for and on behalf of such co-partnership, takes away the common-law right of a plaintiff to sue the members of the company, and compels him to proceed against the public officer alone. It is submitted that it does not, but only gives an additional and less difficult remedy. The words of the clause are *affirmative*, and therefore, according to the established rule of construction of statutes, do not abrogate the common law. *Dwarris on Statutes*, 637, 638; *Com. Dig. Parliament*, (R. 28); 1 *Bla. Com.* 89. Suppose the co-partnership omitted to appoint a public officer, or he were dead or out of the jurisdiction; could it be contended that in such a case the partners could not be sued, and that therefore a creditor of the company should be without remedy? This is an enabling and not a disabling statute. It is an established principle, that a statute ought not to be construed

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as taking away a common-law right, unless by clear and express words. *Davison v. Gill* (a). *Blewitt v. Gordon* (b) is an authority for the plaintiff. That was an action brought against one of the members of a joint-stock company, which was empowered by act of Parliament to sue and be sued in the name of its secretary or of one of the directors; and *Coleridge, J.*, expressed an opinion that the members of the company were not thereby discharged from their individual responsibility. So also, in *Manners v. Rowley* (c), it appears to have been the opinion of the Vice-Chancellor of England, that the common-law remedy is not taken away by this statute.—He referred also to *Fowler v. Rick-erby* (d).

Secondly, the second plea is bad, as being pleaded in bar and not in abatement of the action: for it proceeds upon the ground, not that the defendants did not contract with the plaintiff, but that the action ought to be brought against them through their public officer. That is in effect a plea in abatement of the writ. Thirdly, the plea denies, in an argumentative form, the existence of the causes of action stated in the declaration, and is therefore bad also as amounting to the general issue. It contains no confession of a cause of action against the defendants individually. Fourthly, the plea is informal, for not stating that the parties named as public officers of the co-partnership were nominated to their offices whilst the co-partnership were carrying on their business of bankers. Fifthly, it does not appear on the face of the plea that the causes of action accrued against the defendants in their character of bankers, but only as members of the company. Lastly, it does not state in terms that the parties mentioned therein actually were public officers, but only that they had been nominated and appointed and registered

(a) 1 East, 64.

(c) 10 Sim. 470.

(b) 1 Dowl. P. C. (N. S.)
815.

(d) 2 Man. & Gr. 760; 3 Scott,
N. R. 138.

as such, at the commencement of the suit. It is consistent with this allegation that they might have ceased to fill the office.

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The third plea is clearly bad. There is nothing to preclude one banking company, by its public officer, from suing another such company, although they may be individuals who are shareholders in both companies. The action is not brought against them in respect of bills or notes, or any thing necessarily connected with the business of bankers.

Ogle, *contra*.—The second plea is good both in substance and in form. Under the 7 Geo. 4, c. 46, s. 9, actions must be brought against the public officers of the co-partnership, and cannot be maintained against the individual members. The words “shall and lawfully may” are here imperative, and the remedy pointed out by the statute must be pursued. Such words are to be construed as imperative, wherever that is necessary in order to carry out the intention of the legislature. *Bac. Abr.*, Statute, (I. 5). Thus, the stat. 8 & 9 Will. 3, c. 11, which enacts that plaintiffs “may assign or suggest breaches” on bonds, is construed as compelling them so to do: *Hardy v. Bern* (a), *Roles v. Rosewell* (b). It is said that the common-law right can only be taken away by negative words; yet that statute contains none such. The cases on this subject are all collected in the notes to *Gainsford v. Griffith* (c). [*Parke*, B.—The word “may” in the 8 & 9 Will. 3, c. 11, does not mean “must.” The statute prevents the plaintiff from recovering the full penalty of the bond, and limits him to damages only; then it enables him to assign more breaches than one, which he could not do before: that word “may,” therefore, has its proper effect.] *Gainsford v. Griffith* decides, that wherever a statutory remedy is given for the

(a) 5 T. R. 636.

(b) *Id.* 538.

(c) 1 Saund. 57.

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benefit of an individual, it must be pursued ; and here it is submitted that the legislature intended the proceedings to be taken against the public officer, and against him only. *Cates v. Knight* (a), *Crisp v. Bunbury* (b), *Timms v. Williams* (c), and *The Dundalk Railway Company v. Tapster* (d), are all cases illustrative of the principle contended for by the defendants. These banking companies are the creatures of the legislature ; they were permitted to exist only by the stat. 7 Geo. 4, c. 46 ; they are therefore bound also by the mode of proceeding pointed out by the legislature : especially when it is considered, that otherwise a defendant in this position cannot avail himself of many of the provisions of the statute, and that the remedy of the plaintiff would also be most imperfect and unsatisfactory. Suppose he sue one of the members who was a party to the contract, and he pleads in abatement the nonjoinder of another or others, and the plaintiff then brings another action against them also ; they may again plead in abatement, and the proceedings may be so protracted ad infinitum. On the other hand, if the party first sued neglected to plead in abatement, judgment would go against him for the whole amount of the debt claimed, and no part of the property of the copartnership would be available to satisfy it, beyond his own five or ten shares : nor could the creditor afterwards sue the other members, because they would plead the judgment recovered in the former action. And even if the plaintiff applied to a court of equity to obtain the names of the members of the company, all he could obtain would be the names of the then partners, and of the persons who originally executed the deed of settlement, which might not include all those who were parties to the contract ; and if he were to proceed against one defendant too many, it would be ground of nonsuit. On the other hand,

(a) 3 T. R. 442.

(c) 2 G. & D. 621.

(b) 8 Bing. 394 ; 1 M. & Scott,

(d) 1 G. & D. 657.

supposing the company suing as plaintiffs, they would be nonsuited if one too few were joined. For such reasons it is that the legislature has introduced a code of pleading and proceedings, avoiding all these inconveniences, which therefore ought to be followed. The 4th section enacts, that the co-partnership shall, before issuing any bills and notes, &c., deliver at the stamp-office an account setting forth the title of the co-partnership and names of the members, and also the names and places of abode of the persons who shall have been appointed public officers, "in the name of any one of whom such corporation *shall* sue and be sued as hereinafter provided." There the words used are more directly imperative. Upon the principle contended for on the other side, each individual member would be liable to the penalty of 500*l.* a week, imposed by the 18th section on the co-partnership, for neglecting to deliver such account pursuant to the 4th section. Again, if the plaintiff be right, the 10th section, which provides that no person having a demand against the copartnership shall bring more than one action for it, and that a recovery against the public officer may be pleaded in bar of a subsequent action for the same demand against any other public officer, is altogether a dead letter. It is clear also from the 12th and 13th sections, that the legislature intended that the funds of the co-partnership should be primarily liable to creditors; but under *this* proceeding there is no remedy whatever against the partnership effects.—He cited also *Harrison v. Timmins* (a), *Wilson v. Craven* (b), and *Ex parte Wood* (c); and then contended that the formal objections to the plea could not be supported.

He admitted that he could not maintain the third plea.

Butt, in reply.—In the cases cited on the other side, the

(a) 4 M. & W. 510.

(b) 8 M. & W. 584.

(c) 1 Mont., Deac., & De
Gex, 92.

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right as well as the remedy was created by the statute. Here the banking company exists for many purposes without the aid of the act of Parliament. This is a remedial act, and ought to be construed beneficially for creditors of the co-partnership. The defendants will have their right of contribution, as in other cases of partnership. The 13th section is nothing more than a mode of carrying out the agreement recited in the first section. The consideration for the allowing these companies to issue bills and notes is their increased liability under the statute, and the 13th section is introduced merely to carry out that agreement. It has been decided that, in respect to criminal proceedings for forgery committed on joint-stock banking companies, the provisions of the statute are cumulative merely, and that the prosecutor may notwithstanding lay the intent according to the stat. 11 Geo. 4 & 1 Will. 4, c. 66, s. 28, to be to defraud any specified member of the company "and others." *Rex v. James (a)*.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—[His Lordship stated the second plea, and continued:]—Six objections were made on the argument of the demurrer to this plea, one of substance, the others of a formal nature.

The principal objection was, that in the case of a company established and carrying on business under the provisions of the statute 7 Geo. 4, c. 46, the individual members of it are liable to be sued upon the contracts of the company, as they would have been but for that statute, which, it was argued, gave an additional or cumulative, not an exclusive remedy against the company, by an action against the public officer.

(a) 7 C. & P. 553.

This question, on account of its importance, the Court took time to consider. We have considered it, and are all of opinion, that the creditors of a company so established, and having a public officer, have no remedy against the individual members, as at common law. And we are of this opinion upon the words of the ninth section, giving the remedy against the public officers, and upon the whole purview of the act.

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The words of the section are, that "all actions against the co-partnership *SHALL and lawfully may* be commenced, instituted, and prosecuted against one or more of the public officers nominated as before mentioned, as the nominal defendant." These words, according to their ordinary import, are obligatory, and ought to have that construction, unless it would lead to some absurd or inconvenient consequence, or would be at variance with the intent of the legislature, to be collected from other parts of the act. But this construction is manifestly reasonable and consistent with the context, and in accordance with the intent of the framers of the act, to be collected from every part of it.

It is clear from the recital in the act, and the scope of most of its provisions, that the legislature intended to give to corporations, and to co-partnerships of more than six, within the limits therein mentioned, the power of being banks of issue, the Bank of England waiving its exclusive privilege in their favour, on the condition that the individuals should be liable for the bills and notes issued or money borrowed by such corporations or companies, in the qualified mode pointed out by the act. This liability, by the common law, would not attach at all to individual members of corporations, and would attach, in a different mode from that provided for by the statute, to members of companies: for, at common law, those members only would be liable who were such when the contract was entered into, but by the statute, not only those, but all who be-

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came members afterwards, and until the bills, notes, or debts were paid, are made liable. At common law, all the goods of the contracting parties and their persons would be liable to immediate execution,—by the statute, the goods of the company are liable, and the members for the time being at the period of the execution, in the first instance, and afterwards those who were so at the time of the contracts being entered into or carried into effect, or when the judgment was obtained thereon. In a proceeding against individuals, they would be liable to simple-contract debts for six years, to specialties for twenty: in the statutory mode of proceeding, the members who have ceased to be such for three years are exempt from debts of every description. Thus the liability created by the statute is very different from that which would exist without it; and it cannot be supposed that the legislature meant to leave it to the option of any creditor, whether the members of the company should be subject to one species of liability or the other, still less that a creditor should have the power of depriving them of the statutory protection which is given to each after having ceased for three years to be a partner. The framers of the act had in view the convenience of the public, and thereby provided a more convenient remedy to creditors than at common law; but they had also in view the benefit of the members of the company, by restricting their personal liability. All the clauses of the statute are consistent with this view, and there is one, the 10th, which seems to shew that the legislature did not contemplate that an action would lie for the same debt against the individual members and against the nominal defendant; for it provides, that if the merits have been tried in one action against one public officer, the proceeding may be pleaded in bar of another against any other public officer, and it does not make a similar provision if the merits have been decided in an action against individual members.

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It was objected at the bar, that a creditor must at all events be entitled to sue the individual members if there should be no public officer, or if the officer happened to be out of the jurisdiction, so as not to be capable of being served with process; and that if he *must* have the remedy in such cases, it might be presumed he was at liberty to have recourse to it in all.

If it should be conceded that in those special cases it would be competent for a creditor to sue the members at common law, from the necessity of the case, to avoid a failure of justice, it would by no means follow that he would have the right to do so where the necessity did not exist, and there was, as there is in the present case, an officer resident within the jurisdiction. Whether, even in such cases, an action would lie against individual members, it is not necessary to decide on the present occasion; but there is strong ground to contend, that the legislature meant that there should always be a public officer capable of being sued, and that the company are compellable by law to appoint one.

The case of *Blewitt v. Gordon* was cited as an authority that the creditor had an option to sue a company, constituted as this is, or its individual members; but the act under which the company mentioned in that case was instituted was very different from the present, and the words "*shall* and lawfully may" were held, explained by the context, not to be obligatory.

We are of opinion, therefore, that this act of Parliament meant to give one remedy only, and that against the company, in the name of its public officer, and that the common-law remedy is taken away, at least where such officer exists and is in England; and consequently that the second plea is good in substance.

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It remains for us to consider the other five objections, all of a formal nature, to that plea.

The second objection was, that the defence given by the statute to individuals, was only pleadable in abatement; but it is clearly matter in bar; it is a statutable exemption from the defendants' liability to any action against them, at all events, at the time this action was brought.

The third objection was, that the plea amounted to an argumentative denial of the contract. The answer is, that it does not; it admits that the defendants contracted, but avoids the effect of that admission by the statutable exemption from an action in this form.

Fourthly, it was alleged that the two persons named as officers, were not so nominated whilst the company carried on the business of banking by issuing notes, &c. The answer is, that the statute does not require the appointment to be made during that time. It may be made, and indeed ought to be, before they issue notes at all.

Fifthly, it is objected that the second plea does not state that the causes of action arose against the defendants in their character as bankers. The same answer may be given as to the fourth objection—the statute does not require it. If they are bankers, under the provisions of the act they may sue and be sued on any contract entered into by the partners; and if this objection were well founded, the declaration would be bad.

The sixth objection is, that there is no averment that the two persons named actually *were* public officers, but only that *they had* been nominated and *were* registered as such. We have had some doubt upon this point of mere form; but we think that there is a positive averment that they were, as the plea concludes by stating, that they *so being*, and being duly nominated public officers, as aforesaid, were resident at the commencement of the suit, &c.

The result is, that the defendants are entitled to our judg-

ment on the second plea. The third was properly abandoned by the defendants' counsel: on that the plaintiff is entitled to judgment.

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Judgment for the defendants (a).

(a) In another similar case against another member of the same company, (*Stewart v. Hills*), a plea similar in substance to the second plea in this case was plead-

ed, but in *abatement* instead of in *bar*, and the Court on this ground gave judgment for the plaintiff.

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DEBT, in the sum of £50, for money had and received by the defendant to the use of the plaintiff. Plea, as to the sum of 27*l.* 0*s.* 6*d.*, parcel &c., that before the receiving of that sum by the defendant, a race over a fair hunting country, for a certain sweepstakes, to wit, two sovereigns each, with a certain sum of money, to wit, fifteen sovereigns, added, was about to be run by a mare of the plaintiff and divers horses of other persons; that before the said race, the said sweepstakes of two sovereigns each and fifteen sovereigns added, being the prize for which the said race was to be run, and being a less sum than 50*l.*, was deposited with the defendant, to be by him paid over to the winner of the said race; that the said race was run, and the plaintiff's mare became the winner thereof; and that the said sum of 27*l.* 0*s.* 6*d.* was received by the defendant for the purpose hereinbefore mentioned, and not otherwise.—Verification.

Since the repeal of the stat. 18 Geo. 2, c. 19, a horse-race for money given by third persons, by way of prize, is not illegal.

The stat. 16 Car. 2, c. 9, does not prohibit all gaming, but only such as is *fraudulent* or *excessive*.

A horse-race for a sweepstakes of £2 each is not within the 2nd section of the 9 Anne, c. 14, nor, as it seems, within the 5th section; there not being any loser to the amount of £10.

Seem, that by the stat. 9 Anne, c. 14, not only the *security* given for a gaming debt, but the *contract* itself, was a void-

ed; but at all events this must be taken to be the case since the stat. 5 & 6 Will. 4, c. 41.

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day of March, 1840, [the day on which the statute 3 Vict. c. 5 passed] ; or that money was deposited by any person to the amount of 10*l.*; or that the said money consisted of any wager or stake deposited to the amount of 10*l.*; or that any person lost money to that amount; or that the said race was contrary to any statute.—Joinder in demurrer.

The case was argued on the 6th of December, by

Martin, in support of the demurrer.—This plea is no answer to the action. There is nothing in any statute relating to horse-racing which makes the transaction set forth in the plea illegal. The third section of the statute 13 Geo. 2, c. 19, (relating to the *weights* to be carried by racehorses,) was repealed by the 18 Geo. 2, c. 34, s. 11; and the other provisions of the same statute have been repealed by the 3 Vict. c. 5, which passed before the commencement of this action. The question therefore is, whether either the statute 16 Car. 2, c. 7, or the 9 Anne, c. 14, relating to gaming generally, applies to the present case. Now the second section of the 16 Car. 2, c. 7, applies only to *fraudulent* gaming, being directed against persons who shall “by any fraud, shift, cosenage, circumvention, deceit, or unlawful device or ill practice whatsoever,” in playing at or betting on cards and other games therein mentioned (of which horse-racing is one), win any sum of money or other valuable thing whatsoever. And the third section is especially directed to the prevention of *excessive and immoderate* gaming, whereby above 100*l.* are lost at any one time or meeting “upon ticket or credit, or otherwise;” in which case the loser is not to be compellable to make it good, and the contract and all securities for payment are declared void. The notion upon which that section was framed appears to have been, that there would be less danger of excessive and immoderate gaming, if parties were thus prevented from losing more money than they had about them at the time. Then the statute 9 Anne,

c. 14, s. 2, enacts, that any person "who shall at any time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons so playing or betting in the whole the sum or value of 10*l.*, and shall pay or deliver the same or any part thereof," may within three months sue for and recover it back from the winner in an action of debt; and in case of his not suing within that period, a right of action for treble the value is given to the common informer. The object of this section was in effect to reduce the sum of 100*l.* mentioned in the 16 Car. 2, c. 7, s. 3, to 10*l.* But a debt for money won at gaming from one person for a sum under 10*l.*, is perfectly valid; and here no person could lose more than 2*l.* Assuming, therefore, that the statute of Anne applies to horse-racing, as well as the 16 Car. 2, it does not include this case.

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Butt, contra.—The effect of all the statutes taken together was this. By the 16 Car. 2, c. 7, s. 2, all horse-racing, for whatever amount, was illegal. By the 9 Anne, c. 14, (which does not repeal the statute of Charles,) all gaming is illegal; and that statute has been decided to include horse-racing (*a*), though not specifically mentioned, as in the statute of Charles. Under those two statutes, therefore, all horse-racing was illegal: it was not *legal* if for a stake *under* 10*l.*, although if the sum lost were *above* 10*l.*, the party might, by the second section of the statute of Anne, have an action to recover it back. The 16 Car. 2, c. 7, s. 2, first points to *fraudulent* winning at cards, dice, &c., and then contains an independent enactment as to "cock-fightings, horse-races, dog-matches, foot-races, or other pastimes, game or games whatsoever," not qualified by any words relating to fraudulent practices. The case

(*a*) *Blaxton v. Pye*, 1 Wils. 339; *Clayton v. Jennings*, 2 W. Bla. 706.

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of *Daintree v. Hutchinson* (a) shews that fraud is not necessary to render a *dogmatch* illegal within these statutes.

Then came the 13 Geo. 2, c. 19, s. 2, and 18 Geo. 3, c. 34, s. 11, which legalized horse-races for a plate of the value of 50*l.* or upwards, leaving the law, as to stakes of a lower value, as it was before. [*Alderson*, B., referred to *Goodburn v. Marley* (b). *Rolfe*, B.—The 18 Geo. 2, c. 34, s. 11, which says, that it shall be lawful to run any match or start for any plate &c. of the value of 50*l.* or upwards, at any weights and in any place, without being liable to the penalties in the 13 Geo. 2, c. 19, as to weights, “and in the same manner as might have been done if the said act had never been made,” would seem to shew by necessary implication, that if the 13 Geo. 2, c. 19, had never passed, a horse-race of this nature would have been legal.] That is not so. The 13 Geo. 1, c. 19, legalized horse-races for a stake of 50*l.*, but clogged them with many inconvenient restrictions, which the 18 Geo. 2, c. 34, removed, and the words “as might have been done if the said act had never been made” have reference to those restrictive enactments. Such was the view taken by the Court of those statutes in *Evans v. Pratt* (c). [*Alderson*, B.—In *M’Allester v. Haden* (d), *Lawrence*, J., ruled that an action lies upon a wager on a horse-race run for 50*l.* or upwards, if neither of the sums betted amounts to 10*l.*] It may be that if the money be paid, being under 10*l.*, it shall not be recovered back, both parties being in *pari delicto*; but the contract cannot be enforced in any case, contrary to the express prohibition of the statute. There is nothing in the statute of Anne to legalize gaming for an amount under 10*l.* [*Alderson*, B.—In *Edgebury v. Rosindale* (e), which was decided immediately after the passing of the statute of Charles, it was held that an agreement to run a horse-race for more than

(a) Ante, 85.

(b) 2 Str. 1159.

(c) 4 Scott, N. R. 378; 1 Dowl.

P. C. (N. S.) 505.

(d) 2 Campb. 438.

(e) 2 Lev. 94; 1 Vent. 253.

100*l.* was prohibited by that statute; but it never seems to have occurred to the Court that all horse-races were void.] That case has reference to the third section of the statute. [Parke, B.—Supposing the defendant had given a promissory note to pay the 27*l.* 0*s.* 6*d.*, could it be enforced? If not, can a parol promise?—His Lordship referred to *M'Kinnell v. Robinson* (a).] It must be conceded, that if this were the case of a promissory note, the action could not be maintained; and where is the difference between that and the present case? An *express promise* would be a *security* within the meaning of the statute, being an agreement; à fortiori, no *implied promise* can arise out of the same matter. It is said on the other side, that this is not a wager of 10*l.* or upwards, the stake being 2*l.* each; but it has been decided that the *stake* is the aggregate of all the sums subscribed: *Challand v. Bray* (b). Here the plea is pleaded as to the 27*l.* 0*s.* 6*d.*, and professes to answer that. No doubt, if a party lost less than 10*l.* and paid it, he could not recover it back, nor would the winner be liable to the treble penalty; but the game on which the illegal contract is made is the race run for the aggregate sum.

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Martin, in reply.—The case of *Evans v. Pratt* merely decided that a steeple-chase was a horse-race within the stat. 18 Geo. 2, c. 34. In *M'Kinnell v. Robinson*, the decision was, that money lent to play at hazard could not be recovered back, because hazard is an illegal game, expressly prohibited by the 12 Geo. 2, c. 28. That case does not apply, unless horse-racing be an illegal game. *Daintree v. Hutchinson* only decided that a dog-race for £100 is within the statute of Anne. Now at common law, gaming was perfectly legal, *Sherborn v. Colebear* (c), and it can only be unlawful by virtue of some statute. It is not made so

(a) 3 M. & W. 434. (b) 1 Dowl. P. C. (N.S.) 783. (c) 2 Ventr. 175.

Exch. of Pleas, by the 16 Car. 2, c. 7, which applies only to *fraudulent* gaming, and to *excessive gaming on credit*. There is no-

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thing in that statute to make *any* game per se illegal. It would be somewhat strange if it were so, inasmuch as Charles II. was a great patron of horse-racing, and the breed of horses in this country was much improved by horses brought over in part of the dowry of his queen, Catherine of Braganza, from Tangier. Then the first section of the statute of Anne was framed to carry out the provisions of the former act into more complete effect, by avoiding bonds or other securities given in respect of debts contracted at gaming: but there is nothing in that section to make horse-racing, or a wager upon it, illegal, where no security is given. It leaves the debt arising upon the contract as it was before. The legislature might well say, that the contract itself should be brought before the Court, that they might judge of it legality. [*Alderson*, B.—Would the defendant have been liable on a promissory note? If not, then, upon the principle laid down in *Young v. Moore* (a), is not the contract void?] The dictum in that case was extra-judicial, and is at variance with the cases of *Robinson v. Bland* (b) and *Barjeau v. Walmsley* (c).

Secondly, the 9 Anne, c. 14, s. 2, is directed against the case of parties losing £10 or upwards; here nobody could lose more than £2.

Cur. adv. vult.

The judgment of the Court was now delivered by

ROLFE, B.—This was an action for money had and received to the use of the plaintiff. The defendant pleaded, that as to 27*l.* 0*s.* 6*d.* parcel &c., a certain race for a sweepstakes, (to wit, of two sovereigns each,) with a cer-

(a) 2 Wils. 67.

(b) 2 Burr. 1077; 1 W. Bla. 260.

(c) 2 Stra. 1249.

tain sum of money (to wit, fifteen sovereigns) added, was about to be run by and between a mare of the plaintiff and divers horses of other persons, and before the race, the said sweepstakes of two sovereigns each and the fifteen sovereigns added, (being the prize for which the said race was to be run,) and being less than £50, to wit, £29, of which the said sum of 27*l.* 0*s.* 6*d.* is parcel, was delivered to and received by the defendant to abide the event of the race. The plea then goes on to state, that the race was afterwards run, that the plaintiff won the race, and that the money was received by him, the defendant, under the circumstances aforesaid, and no others.

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To the plea the plaintiff demurred. The plea was evidently framed on the provisions of the 13 Geo. 2, c. 19, which prohibits all horse-races for a plate or prize of less value than £50: the pleader having inadvertently overlooked the circumstance that the statute of Geo. 2 was repealed by the 3 & 4 Vict. c. 5. The plea, therefore, so far as it rests on the statute of Geo. 2, clearly cannot be supported.

It was, however, argued on behalf of the defendant, that independently of the statute Geo. 2, the plea discloses a good defence, for that the whole transaction was illegal under the statutes against gaming, namely, 16 Car. 2, c. 7, and 9 Anne, c. 14, and consequently that the money in question cannot be recovered in a court of justice.

But this argument cannot be supported.

According to the construction which a great variety of cases have put on these acts, it must be taken, first, that horse-racing is a game within the meaning of the statute of Charles 2; and secondly, that the games contemplated in the statute of Anne, though not there enumerated, are the same as those referred to in the statute of Charles 2. Is then the race, as described in the plea, made illegal by either of those statutes? We think not.

The statute of Charles 2, according to our construction

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of it, does not make illegal all gaming, but such only as is fraudulent or excessive. There is, indeed, a little ambiguity in the language of the second section of that statute, which has given rise to the argument insisted on by the defendant, that though in respect of gaming with cards, dice, &c., nothing is made illegal but the fraudulent winning of money at such games, yet with respect to horse-races, foot-races, and other sports of a like nature, enumerated in the act, the case is different, the act having (as it is contended) altogether prohibited such sports for money. But though the clause in question might bear such a construction, yet it certainly will admit of another, and, as we think, far more reasonable interpretation; namely, that the fraud, deceit, ill practices, &c., mentioned in the second section of the act, are intended to apply to all which follows in that section, and consequently that the clause in question has no reference to the case of persons fairly running horses for money, or fairly betting on races or other sports of like nature. And we adopt this construction, first, because the act itself, both in its title and preamble, appears to be directed solely against fraudulent and excessive, and to be in no respect pointed at moderate play, when there is no fraud; and secondly, because it appears to us to be absurd to suppose that the legislature could look with greater jealousy at racing and sports of a like nature, than at gaming with cards and dice, the latter particularly having been from time to time considered as of so demoralizing a character, as to have given rise to various statutes for checking its prevalence.

The race, therefore, as stated in the plea, is not prohibited by the statute of Charles 2, for it is not suggested to be fraudulent, nor is it excessive within the meaning of that statute, which in substance defines excessive gaming to be gaming where one party loses on ticket or credit more than £100 at one time or sitting.

If, then, the race in question was not illegal under the

statute of Charles, how is it affected by the statute of 9 Anne, c. 14?

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That statute enacts, first, that all securities given for money lost at play shall be void, and afterwards enables any person who shall have lost £10 at any one time or sitting, to recover it back from the winner; and it then imposes penalties on any party who shall at one time win £10 or upwards from any person or persons. The first question argued before us on the effect of this statute was as to the first section; the plaintiff contending, that though, under that section, any note, bill, or other security was void, yet the contract itself was not avoided. The defendant, on the other hand, argued, that though the security alone was in terms made void, yet by necessary implication the contract was also avoided.

It must be admitted that the authorities on this point are far from satisfactory.

In *Barjeau v. Walmsley* (a), *Alcimbroke v. Hall* (b), and *M'Allester v. Haden* (c), it was held that the security only, and not the contract, was rendered void by the statute. And in *Robinson v. Bland* (d), Lord Mansfield expressly stated, that it had been twice judicially determined that the object of the legislature was to avoid the security, and not the contract, in order to give Courts an opportunity to examine into the merits of the consideration: and there are certainly other dicta to the same effect. On the other hand, in *Young v. Moore* (e), the Court of Common Pleas held, that the statute by necessary implication made void the contract as well as the security; and it is evident that this Court, in *M'Kinnell v. Robinson* (f), inclined to that as the more reasonable view of the law. The ground suggested by Lord Mansfield, namely, that the object of the legislature was to give the Courts an opportunity of look-

(a) 2 Stra. 1249.

(b) 2 Wils. 309.

(c) 2 Campb. 438.

(d) 1 W. Bla. 260.

(e) 2 Wils. 67.

(f) 3 M. & W. 440.

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ing into the merits of the consideration, is evidently untenable. The nature of the consideration would be brought before the Court as well in an action on a promissory note or bill of exchange, as in an action on the contract. Besides, if the consideration is legal, what is there for the Court to inquire into, and why in such a case should the legislature avoid the security at all? We have adverted to this section of the statute, and the authorities upon it, as they were much pressed in the argument, though in truth, in our view of this case, they do not apply to the question before us; and we only think it necessary to add on this point, that whatever might have been the opinion of this Court as to the true construction of the clause in question, if we had been called upon to balance the authority of the earlier decisions against each other, and to decide between them, it is not now necessary to do so. For we think that the legislature, in passing the 5 & 6 Will. 4, c. 41, has in fact pronounced its decision upon this point.

That act, while it repeals so much of the statute of Anne as makes the securities void, expressly enacts that they shall be deemed to have been given on an illegal consideration; and it is impossible to impute to the legislature an intention so absurd, as that the consideration should be good and capable of being enforced, until some security is given for the amount, and then that by the giving of the security the consideration should become bad.

We assume, therefore, with the defendant, that the statute of Anne, in connexion with the 5 & 6 Will. 4, c. 41, must be taken to avoid all contracts for the payment of money won at play. But then the question arises, is the contract which the plaintiff here is seeking to enforce a contract for the payment of money lost at play, within the true intent and meaning of the statute of Anne? We think it is not. One great object of the statutes of Charles II. and Anne (both of which must be construed together) was to prevent gaming on credit, and to confine par-

ties who were playing for money to such sums as they should pay down at the time of the play. Now we are of opinion, that money deposited in the hands of a stakeholder before a game is played or a race run, to be handed over to the winner, is precisely that sort of transaction that the legislature, supposing that the parties were to engage in play at all, meant to encourage and not to prohibit. It is in no fair sense gaming upon credit or ticket. It is in truth the only sort of gaming for ready money which the nature of the case admits. The legislature most wisely thought, that they might with comparative safety trust persons to play for money, if payment of all losses was made at the time and on the spot, and not deferred to a future occasion. The deposit with the stakeholder is ready-money payment in the strictest sense. All parties part with their money before the game begins. The stakeholder holds it as agent for the winner, and when the winner is ascertained by the result of the game, he has a right to treat the stakeholder as having gotten into his hands money, which in the result of a lawful transaction turns out to belong to him, the winner. The case appears to us to be entirely out of the mischief which this branch of the statute was intended to remedy, and not to come within its provisions.

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If, then, the plaintiff is not within the statute of Charles II. or the first section of the statute of Anne, is he prevented from recovering by the second and fifth sections of the latter statute, by which the loser of £10 or upwards at any one time or sitting may recover it back, and the winner of £10 or upwards at any one time or sitting is subject to heavy penalties?

On this part of the case it may be observed, that certainly here no one has lost £10, so that nothing could be recovered back by the losers under that branch of the statute. But by the fifth section, it is made highly penal to win from any person *or persons* £10 at any one time or

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sitting; and the question is, whether the plaintiff recovering the money in question in this case, which exceeds £10 beyond the money added by way of gift, would be liable to be prosecuted as a party who had won £10 at one time. We strongly incline to think he could not; for though the fifth section imposes the penalties on any person winning £10 from any person *or persons*, yet, considering the highly penal nature of the clause, and the previous enactments in section 2 in favour of the *loser* of £10, and the corresponding provisions in the statute of Charles II., we think it very doubtful whether any person can incur the penalty imposed on the *winner*, where there is not a corresponding loser to the requisite amount. It is not, however, necessary for us expressly to decide that point, for here, it is to be observed, the action is brought to recover deposits of two sorts; viz., first, the stakes deposited by the parties engaged in the race, and secondly, a sum of money added by a stranger, by way of premium or prize to be run for. Now, it is clear, that since the repeal of 13 Geo. 2, c. 19, there is nothing to prevent a race for a sum of money not raised by the parties themselves (that being in truth a wager), but given by way of prize by a third person desirous of encouraging racing; and as a part of the sum deposited with the defendant consists of money so given, the plea of the defendant is clearly bad, as attempting to cover too much. Whatever may be the right of the winner as to the subscriptions of two sovereigns each, he is certainly, on these pleadings, entitled to the £15 which were given ultra the stakes by way of prize; and our judgment must therefore be for the plaintiff.

Judgment for the plaintiff.

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DEBT on simple contract.

The defendant pleaded, first, *nunquam indebitatus*; secondly, a set-off in the usual form, for £400 for goods sold and delivered, work and labour and materials, and money due on an account stated; which said sum of money in which the plaintiff was and is so indebted as aforesaid, exceeds the said debt due and owing from the defendant to the plaintiff, and the damages by the plaintiff sustained on occasion of the detention thereof, as in the declaration mentioned, &c.; concluding in the usual form of a plea of set-off.

Replication to the plea of set-off, that, except as to the sum of 97*l.* 12*s.* 4*d.* parcel of the said monies sought to be set off by the defendant in the said second plea, he the plaintiff was not at the time of the commencement of this suit, and at the time of the pleading the said second plea, indebted to the defendant in manner and form, &c., concluding to the country. And as to the said sum of 97*l.* 12*s.* 4*d.*, parcel as aforesaid, the plaintiff says, that though true it is that he the plaintiff, before and at the time of the commencement of this suit, and from thence until and at the time of pleading the said second plea, was indebted to the defendant in the said sum of 97*l.* 12*s.* 4*d.*, parcel of the said money by the defendant in his said plea mentioned and thereby sought to be set off; yet the plaintiff says, that heretofore and after the accruing of the said causes of set-off, so far as they relate to the said sum of 97*l.* 12*s.* 4*d.* parcel as aforesaid, and *before the pleading of this replication*, to wit, on the 22nd day of April, 1842, the now defendant issued a certain writ of summons out of the Court of our Lady the now Queen, before the Barons of her Exchequer at Westminster, and directed to the now plaintiff, whereby our said Lady the Queen commanded the now plaintiff, that, within eight days after the

To a plea of set-off, the plaintiff replied that except as to 97*l.* 12*s.* 4*d.*, parcel &c., he was not at the commencement of the suit, and at the time of plea pleaded, indebted *modo et forma*, and as to 97*l.* 12*s.* 4*d.*, parcel &c., that before the pleading of the replication, the plaintiff had paid that sum into Court in a cross action brought against him by the defendant, which sum the defendant took out of Court in full satisfaction &c., and entered a *nol. pros.* to the rest of the declaration; concluding with a verification:—*Held*, on special demurrer, that the replication was bad.

Semble, that where there is a demurrer to two counts, or two pleas, one of which is bad and the other good, the Court ought to give judgment on the whole record, according to the truth, and not to overrule the demurrer as being too large.

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service of the said writ, &c., he should cause an appearance to be entered for him in the said Court, in an action of debt at the suit of the now defendant, and which same writ was indorsed as follows:—"The plaintiff claims 117*l.* 12*s.* 10*d.* for debt, and 2*l.* 4*s.* 4*d.* for costs;" and the said now plaintiff thereupon afterwards, to wit, on the 2nd May in the year aforesaid, in due time and manner did duly cause an appearance to be entered for him &c., as by the record &c.; and the now plaintiff further says, that the said writ so issued on the 22nd April as aforesaid, was issued and prosecuted by the now defendant for the recovery of a certain sum then claimed by him to be due and owing to him from the now plaintiff, to wit, the sum of 117*l.* 12*s.* 10*d.*, which included the said sum of 97*l.* 12*s.* 4*d.* parcel as aforesaid, which last-mentioned sum was, at the time of the commencement of the said suit by the now defendant, actually due and owing from the now plaintiff to the now defendant, and in arrear and unpaid.—The replication then went on to allege, that the now plaintiff having so entered an appearance, &c., the now defendant afterwards, and before the pleading of this replication, and before the now defendant pleaded in this action, to wit, on the 2nd May, in the year &c. aforesaid, declared against the now plaintiff in the said suit, in debt for £200 for goods sold and delivered, in a like sum for work and labour, and in a like sum for money due on account stated. It then averred the identity of the sum of 97*l.* 12*s.* 4*d.*, parcel of the money sought to be set off in the plea, with the like sum, parcel of the debt in the declaration in the former action; and went on to state, that after the now defendant had so declared against the now plaintiff as aforesaid, and after the now defendant had pleaded the second plea in this action, and before the pleading of this replication, to wit, on the 3rd July, 1842, the now plaintiff pleaded to the said action: first, except as to the sum of 97*l.* 12*s.* 4*d.* parcel &c., nunquam indebitatus; secondly,

as to £45, parcel &c., and other than the said sum of 97*l.* 12*s.* 4*d.*, accord and satisfaction; thirdly, as to £15, further parcel &c., and other than the said sums of 97*l.* 12*s.* 4*d.* and £45, payment before action brought; and lastly, as to 97*l.* 12*s.* 4*d.*, payment into Court. The replication then averred the identity of this last-mentioned sum with the sum of 97*l.* 12*s.* 4*d.* parcel of the money sought to be set off in the present action, and alleged that the now defendant, before the pleading of this replication, replied to the above pleas of the now plaintiff, by taking the sum of 97*l.* 12*s.* 4*d.* out of Court, in full satisfaction &c., and entering a nolle prosequi to the rest of the declaration; and averred the identity of the sum of 97*l.* 12*s.* 4*d.*, so taken out of Court in full satisfaction &c. with the like sum now sought to be set off, and that the plaintiff never was indebted to the now defendant to a greater amount than the said sum of 97*l.* 12*s.* 4*d.* in respect of the cause of action in the introductory part of the last-mentioned plea; concluding with a verification.

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Special demurrer, and joinder in demurrer.

J. Henderson, in support of the demurrer.—The replication admits that the set-off was an answer to the action at the time of the plea being pleaded; but the plaintiff seeks to avoid its effect by something in the nature of a replication puis darrein continuance. But supposing that such a replication might be good, if pleaded against the *further* maintenance of a set-off, it cannot be pleaded generally in answer to a plea in bar of the action, so as to render the defendant liable to costs in respect of a plea which was effectual when it was pleaded. In *Evans v. Prosser* (a), the defendant had pleaded a set-off, and it was held to be no answer to that plea that he had brought an action against the plaintiff for the same sum, and that the plaintiff had paid that

(a) 3 T. R. 186.

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sum into Court. In *Baskerville v. Brown* (a), it was held that a defendant might set off a verdict recovered by him against the plaintiff in another action. Here, what the defendant has stated, and the plaintiff has admitted, shews that the action ought not to have been brought at all. In *Knibbs v. Hall* (b), it was held to be no objection to a set-off of a debt, that the defendant had commenced an action for the recovery of that debt before the plaintiff's cause of action accrued. [Parke, B.—Those cases proceed on the authority of *Baskerville v. Brown*, which is no authority on this point, because there there was no plea of set-off. This replication is like a plea in bar to the further maintenance of a cross action, on the ground that since the commencement of the suit, the debt mentioned in the plea of set-off has been paid, and consequently that the plaintiff is entitled to recover the amount he claims. The meaning of a plea of set-off is, that the plaintiff was and *still is* indebted to the defendant in a larger amount than his demand against the defendant, and in order to make that defence available, it should be equally true at the time of the trial as at the time of pleading. Before the new rules, the same question might have been raised; for in answer to the proof of a set-off under a notice, the plaintiff might have shewn that it was since discharged by payment.]

Then, secondly, the replication is wrong in form. A plea of set-off is one entire proposition, raising a single issue, namely, that there is due to the defendant from the plaintiff a greater sum than is due from the defendant to the plaintiff. The plaintiff ought to have replied to the whole in one replication. This replication is improperly divided into two parts. He should, at least, have alleged that the residue of the set-off did not exceed the debt and damages claimed in the declaration, and concluded with a verification. A verdict for the defendant on the issue

(a) 2 Burr. 1229; 1 W. Bl. 293.

(b) Peake's N. P. C. 276.

taken by the plaintiff as to the residue would not avail the defendant, because it would not appear that such residue (that is, the amount beyond the 97*l.* 12*s.* 4*d.*) exceeded the debt and damages claimed in the declaration.

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Crompton, contra.—If either branch of the replication be good, the plaintiff is entitled to judgment, as the demurrer to the whole is too large. In *Dowland v. Thompson* (a), it was held that two parts of a plea of set-off are like two counts in a declaration; so that if either be good, a general demurrer to the whole is bad. *Vivian v. Jenkin* (b) shews that the plaintiff is entitled to divide the plea, and to reply separately to different parts of it. But both parts of the replication are good. It first makes the amount of 97*l.* 12*s.* 4*d.* a material question, to which it gives a complete answer by shewing satisfaction; and as to the residue, it tenders an issue to the country, to which the defendant has only to add the similiter. [*Parke, B.*—The objection is, that the defendant has not alleged that the residue of the set-off, exclusive of the 97*l.* 12*s.* 4*d.*, is sufficient to overtop the plaintiff's demand; you conclude to the country, as if that fact had been averred in the plea, which it is not. If you had replied *nunquam indebitatus* beyond 97*l.* 12*s.* 4*d.*, and as to that sum pleaded satisfaction, your replication might be good; for *nunquam indebitatus* to a plea of set-off means, either that the defendant has no cross demand against the plaintiff at all, or if he has, that it does not overtop or equal the plaintiff's claim. Now the replication and plea here do not mean the same thing. The plea says, that, including the sum of 97*l.* 12*s.* 4*d.*, the defendant has a claim against the plaintiff equal to the plaintiff's demand against him; the replication says, that the balance after deducting 97*l.* 12*s.* 4*d.* is not sufficient to meet that

(a) 2 W. Bl. 910.

(b) 3 Ad. & Ell. 741; 5 Nev. & Man. 14.

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demand. The defendant never said it was; it is altogether a new proposition, which he ought to have had an opportunity of answering. As the record now stands, if it were to appear that one farthing were due from the plaintiff to the defendant beyond 97*l.* 12*s.* 4*d.*, the issue would be found against the plaintiff, although on the whole plea he would be entitled to a verdict.] The plaintiff, by thus replying, has made the actual amount material. Pleas of set-off are to be taken as divisible, so that if the other pleas on the record, taken in connexion with a portion of a plea of set-off or payment, will cover the whole cause of action in the declaration, the defendant will be entitled to the general verdict.

PARKE, B.—We think the replication is clearly bad, in separating the two parts of this plea in the manner it has done. If the intention of the plaintiff were to deny that more than 97*l.* 12*s.* 4*d.* was due to the defendant at any time, he ought to have framed his replication in such a way as to give the defendant an opportunity of answering that allegation. On the record as it now stands, there is no averment on the part of the defendant that the monies in the plea, exclusive of the sum of 97*l.* 12*s.* 4*d.*, are sufficient to meet the plaintiff's demand. The plaintiff has replied as if that fact were alleged in the plea, and therefore the replication is bad, inasmuch as there is no affirmative allegation on the one side met by an express negative on the other. The plaintiff may have leave to amend, if he is desirous of trying the question raised by the other part of the replication; but it seems to me a question of costs only. With respect to the subject of a demurrer being too large, there is a very learned note of my Brother *Manning* to the case of *Hinde v. Gray* (a),

(a) 1 Man. & G. 201, note (a).

which, in my opinion, is entitled to considerable weight. He states the modern practice, as to overruling demurrers as being too large, to have been imported from courts of equity. There had been formerly cases in the Court of Queen's Bench, and also in the Court of Common Pleas, where demurrers had been said to be overruled as being too large; which have been followed by subsequent decisions in this Court. The question is, is that practice right or not, or ought not the Court on such demurrer to give judgment on the whole record, according to the truth? I think the observations in that note are entitled to considerable weight, and I am inclined to think the practice has been wrong, and that judgment on demurrer should be given on the whole record according to the truth. Take for instance the case of a general demurrer to two counts, one of which is good and the other bad, the plaintiff ought to have judgment on the good count, and not on the other: in short, the Court should look at the whole record, and see what is the proper judgment to give upon the whole. If that be not done, considerable difficulty may arise in the assessment of damages.

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ALDERSON, B., and ROLFE, B., concurred.

Judgment for the defendant.

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THE CONSTABLES and BURGESSES of the TOWNSHIP of
CHORLTON-UPON-MEDLOCK v. WALKER.

By a local act of Parliament, commissioners were authorized to pave and cleanse certain streets, squares, &c., within a township, and to charge the expenses upon "the owners of buildings, ground, or land within or adjoining the said streets, squares," &c.: Provided, that if certain sewers required enlarging, "the owners of houses, buildings, lands, grounds, or hereditaments," should pay only a certain proportion of the expense. B., a clergyman, being desirous of building a church, and settling out a churchyard, purchased a plot of ground, which was conveyed to T. and O., as trustees for that purpose, and the church and churchyard having been built and set out accordingly were duly consecrated. By the deed of consecration, the right of letting or otherwise disposing of the pews, vaults, and graves in the church and churchyard was reserved to B. The church and churchyard adjoined a street which had been paved by the commissioners. B. conveyed to the defendant in fee, by way of mortgage, the pews and vaults in and under the church remaining unsold, and so much of the churchyard as had not been sold, together with the rent, pensions, stipends, &c., thereunto belonging. The defendant received the rents and profits arising from the pews, vaults, and graves in the church and churchyard, and appropriated the same in part satisfaction of his debt.

THIS was an action of debt, which came on to be tried before *Rolfe*, B., at the Liverpool Spring Assizes, 1842, when a verdict was found for the plaintiffs by consent for 389*l.* 17*s.* 4½*d.*, subject to the opinion of the Court upon the following case:—

The action was brought to recover 389*l.* 17*s.* 4½*d.* from the defendant, as his proportion of the charges payable for paving and cleansing Ormond Street, in the township of Chorlton-upon-Medlock, in the parish of Manchester, in alleged pursuance of the stat. 2 Will. 4, c. xc, intituled "An Act for improving and regulating the Township of Chorlton-upon-Medlock, in the County of Lancaster." Ormond Street, and three other streets within the said township, form nearly a square, enclosing and adjoining the churchyard of All Saints Church, which is built in the centre of the churchyard, the churchyard being separated from the street by iron palisades. Ormond Street had been laid out and made, and had buildings and enclosed places at its sides, but had not, before it was paved, &c., by the plaintiffs, been paved, flagged, or put into good order &c. within the meaning of the act. The owners and occupiers of the adjoining premises having received notice to level the said street, and having omitted to do so, the plaintiffs caused the same to be paved and flagged, and brought the present action to recover from the defendant his proportion of the charges.

Held, that the defendant was not liable to be charged, as he was not "the owner of buildings, ground, or land," within the meaning of the local act.

The plaintiffs contended, that the defendant was liable by virtue of the local act, section 82, as being in possession of the church and churchyard, and the pews, seats, and vaults in or under the church, and also all the glebelands, buildings, rents, stipends, pensions, perquisites, and emoluments of and belonging to the benefice and living of the said church and churchyard, as mortgagee thereof. In 1819, the Rev. E. Burton, being desirous of building a church, purchased the plot which is now the site of the church and churchyard, and the same was conveyed to him by lease and release, for life, remainder to the defendant in trust for him, remainder to Burton in fee. Mr. Burton covenanted not to build anything thereon except a church, and to appropriate the remainder to a cemetery. By indentures made between the Rev. E. Burton of the first part, the defendant of the second part, the Bishop of Chester of the third part, and Mr. Todd and Mr. Orford of the fourth part, the plot was conveyed to the latter persons upon trust that they would erect a church, and procure the same and the churchyard to be consecrated according to the rites and usages of the Church of England. In 1820 the church was completed, and with the churchyard was duly consecrated. Part of the churchyard was appropriated to the poor, who were buried therein without any charge beyond the surplice fees. The deed of consecration reserved to Burton the right of letting or otherwise disposing of the pews, seats, and vaults in the church, and the vaults and graves in the churchyard.

In 1829 Burton conveyed, by way of mortgage, to a Miss Orred, the rents issuing from the pews, seats, vaults, and graves in the churchyard, together with the pews, seats, vaults, &c., and so much of the churchyard as remained unsold. In 1832 he made a second mortgage to the defendant, and thereby granted to him in fee the pews, seats, and vaults in or under the church then remaining unsold, and so much of the churchyard as had

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not been sold, together with the glebe-lands, buildings, rents, stipends, pensions, perquisites, and emoluments of or belonging to the benefice or living of the said church and churchyard, subject to the mortgage to Miss Orred. The defendant having made an arrangement with Miss Orred for discharging her mortgage, received the rents and profits arising from the church and from the burial-ground in the churchyard, and, after making certain disbursements and allowances to Mr. Burton and others, and certain payments to Miss Orred, retained the remainder in part satisfaction of his own mortgage, which still remained unsatisfied.

The question for the opinion of the Court was, whether the defendant was liable to the plaintiffs for the said demand in respect of his interest or possession of the said church or churchyard, or either of them, under the circumstances above mentioned.

The point marked for argument on the part of the plaintiffs was, that the defendant is the mortgagee in *possession* within the true intent and meaning of the 27th section of 2 Will. 4, c. xc, and as such liable to this action.

Martin, for the plaintiffs.—The question in this case turns principally upon the construction to be put upon the 82nd section of the local act 2 Will. 4, c. xc, which empowers the commissioners appointed under it to cause “all such of the present and future streets, squares, places, &c. situate within the township of Chorlton-upon-Medlock, which then were or thereafter should be laid out and made, but not paved, flagged, cleansed, &c. or any part or portion thereof which should have any buildings, tenements, yards, or inclosed places, except such as are used only as arable, meadow, or pasture land, whether the same should be in a continuous line or not, at the side or respective sides thereof, to the extent of one-half part of the whole of such streets, &c., to be paved, flagged, soughed, drained, cleansed, repaired,

completed, amended, and put into good order in such manner as to the commissioners should seem meet; and the charges and expenses attending or in any manner relating to such new pavements, flaggings, &c. &c. shall be paid and reimbursed to the said commissioners by the owners of the houses, buildings, ground, or land within or adjoining the said streets, squares, places, &c. so to be new paved, &c., each such owner paying an equal share or proportion thereof, according as such new pavements &c. are, is, or shall be either before, behind, or at the side or corners of his, her, or their house or houses, buildings, ground or land; and such portions of the costs, charges and expenses &c. shall and may be charged to such owners in such proportion as the commissioners shall consider fair and reasonable;” and it provided, that if such owner should at any time refuse to pay such charges and expenses when required, the same should and might be levied by distress, or it should be left for the commissioners to recover such charges and expenses from every such owner by action at law &c. “Provided nevertheless, that in all cases where the said commissioners shall require any main sewer to be made deeper or of greater dimensions than shall be necessary for the sufficient draining of any such street &c., the owners of houses, buildings, lands, grounds or *hereditaments* therein or adjoining thereto, shall not be required to pay more than such of the expenses of making such main sewer as would be necessary for that purpose; and the additional expenses incurred by making such larger or deeper sewer shall be borne by the said commissioners, and paid out of the rates to be levied by the authority of this act.” Under that section, the owner of any property adjoining the street which does not come within the exception of arable, meadow, or pasture land, is liable to be rated. The word “*hereditaments*,” introduced into the proviso at the end of this section, should be read in conjunction with the words “buildings, ground or land,” in the enacting part of it. It

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is perfectly clear that the intention of the act was to charge the owners of all property adjoining the street, with the exception of what is expressly excepted, with the repairs of the street. It is property divided into three heads, lands, tenements, and hereditaments, and the latter word includes property whether corporeal or incorporeal. The definition of "hereditaments," in the *Termes de la Ley*, is thus given: "Hereditaments signify all such things, whether corporeal or incorporeal, which a man may leave to him and his heirs by way of inheritance, and which, if they be not otherwise bequeathed, come to him which is next of blood, and not to executors or administrators as chattels do:" which is entirely conformable to what is said in *Co. Lit.* 6. a. That this property has been treated as a freehold is clear, from its having been conveyed by lease and release. This is an inheritance in the land, not a mere equitable right, but an hereditament, and if so, it is within the 82nd section. The defendant is the owner of the church, churchyard, pews, and vaults, and receives the profits from them, and as such is liable to be rated. The word "owner" is not here to be taken in its strictest sense, as meaning the owner of the fee, but the owner for the time being. [*Parke*, B.—If the premises are unoccupied, the notice is to be placed upon the door. How would you give notice in a case like this?] Notice must be given to the person who is in receipt of the rents and profits. In *Lester v. Lobley* (a), where trustees under a turnpike act were authorized to enter upon and take certain lands, making satisfaction to the *owners or proprietors* thereof, it was held that the words *owners or proprietors* included tenants for terms of years. In that case, *Littledale*, J., says, "These words [*owners or proprietors*] are not legal terms, but they must be understood from their ordinary use. I do not see that '*owners*' necessarily

(a) 7 Ad. & Ell. 124.

mean the tenant in fee-simple. In common sense, one would ask, Where is the land? Who has the beneficial rent? If there be a nominal rent, how can the tenant in fee-simple be the owner? Suppose there were a lease for ninety-nine years, with no rent reserved; in common sense you would call the lessee the owner. The word 'owner' has therefore no definite meaning." These words used in acts of Parliament are to be taken in their ordinary and popular sense. In *Tibbits v. Yorke* (a), where the salary of a clerk was directed by an act of Parliament to be paid by the "proprietors" of tolls, it was held, that a trustee of the tolls for the payment of debts, having entered into receipt of the tolls, appointed a collector, and represented himself to the commissioners as a mortgagee of them, was liable to the payment of the salary. So, in *Regina v. St. Martin's-in-the-Fields* (b), where a local act directed a rate to be laid on all persons holding or occupying any lands, "buildings, tenements, or hereditaments," it was held, that the lessee of a private box in Drury Lane Theatre was liable to be rated. This act ought to be so read as if the word "hereditaments" had been used in the first part of the 82nd section, for it is used in the proviso, and it is plain that it must have been omitted by accident. The proviso shews that the word "hereditaments" is to be applied to every thing contained in the section. That word is used also in the following section, (the 83rd), which provides that notice is to be given to the owners and occupiers of the buildings, lands, grounds, or *hereditaments*, within or adjoining to the said streets &c., requiring them to pave, &c. the same before it is done by the commissioners. It is used also in the 87th section, which provides that, in all cases where houses, buildings, tenements, grounds, lands, or other hereditaments are held upon leases for lives perpetually renewa-

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(a) 5 B. & Ad. 605.

(b) 2 G. & D. 426.

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ble, or for the term of ninety-nine years, or any longer term, whereof twenty shall be unexpired, or shall be in the possession of any mortgagee, the party so holding and such mortgagee shall be deemed and taken to be the owner of such premises for the purposes of this act. This, it is submitted, shews that in the first part of the 82nd section the word "hereditaments" was omitted by mistake. This is a most profitable interest in land, for the defendant is in the possession and receipt of profits exceeding £500 a-year. He is therefore liable, and not the trustees. [*Parke, B.*—Must not the trustees be liable unless they have transferred the property to some one who is the owner? The statute does not say beneficial owner.] Here there has been an adverse possession of twenty years. The defendant is the person in possession of this land and building, so as to be liable to this rate.

Cowling, contra.—This case depends mainly on the construction to be put upon the 82nd section of the act, which not being an act for raising money for necessary purposes, as a poor rate, but for providing conveniences unknown to the common law, must be construed strictly; and the presumption would be, that the legislature, in passing the act, intended the rate to be charged on the owners of such property alone as was benefited in consequence. It is, therefore, immaterial to consider whether the poor-rate could be imposed on the church. This view of the subject was taken in *Rex v. The Manchester and Salford Waterworks Company* (a). There, an act for cleansing, lighting, watching and regulating the streets of the town of Manchester and Salford, authorized the commissioners to ascertain the sum to be raised by rates on the inhabitants of the township, and to raise such sum by assessment upon the tenants and occupiers of all messuages, houses, &c., and other buildings,

(a) 1 B. & Cr. 630; 3 D. & R. 20.

gardens or garden ground, and other *tenements* in the township; and it was held that under that act the trunks, pipes, and other apparatus of the Water Company, did not constitute a "tenement" within the meaning of the act, though it was admitted the company would have been rateable to the relief of the poor under the stat. 43 Eliz. as the occupiers of land. And *Bayley, J.*, in delivering the judgment of the Court, says, "The omission to use the obvious and general word 'lands,' and yet introducing 'gardens and garden grounds,' implies that 'lands' in general were not intended to be rated. The object of the act was to give security and accommodation to the residents and to their property. The inhabited houses and everything that was connected with residence or trade, as they were to have the advantage, were to be liable to the charge." In fact some inference may be drawn from the legislature having, by a nearly contemporaneous act, 3 & 4 Will. 4, c. 80, exempted all churches from poor-rates, that it could not be their intention that they should remain liable to a charge like the present. It should be borne in mind that this being an improvement act, and the object being to rate property for the sake of procuring advantages in a certain district, to rate the church would be to rate the result, instead of rating the fund or means for producing that result; and it would be at least as reasonable to rate the streets when improved by paving, &c. as the church, which is, perhaps, the greatest of the benefits conferred on the district. It may be admitted that the words used in the 82nd section are to be read in their ordinary and popular, and not in their strict legal sense; for the commissioners who are to carry the act into execution, are to be taken promiscuously from the district (see s. 6); but so reading them, the words "buildings, ground, or land," cannot be construed to apply to a church. If the word "building" means a church, how is the notice required by the 83rd section to be given? The 108th section requires "houses and buildings" to be

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numbered. Now, can it be said that this church is to be numbered? If you follow the words "houses and buildings" as used in other sections, it will be seen that the legislature did not intend to include a church. It was only intended that property should be rated which was capable of occupation, and beneficially so, in the ordinary sense, that is, in a temporal view, as by yielding rent, &c. Thus the 83rd section requires notice to be given to the owners and occupiers of buildings, &c., and even provides for the case of the property happening to be unoccupied for a time. Again, the 84th section requires the "*occupiers* of any premises," the owners of which shall be liable to pay money to the commissioners, to pay their rents to the commissioners; and the 85th provides that such payments by *occupiers* of premises shall be deemed good payments of such and so much rent, as if paid to the landlord. Those provisions are plainly not applicable to a church, and the act throughout assumes that, the property to be rated is of a nature which could be beneficially occupied, and from which rents could be received. Now the moment a church is consecrated, it ceases to be a source of temporal profit. It is immaterial that some profit or gain may indirectly arise to the founder of a church by having the patronage of it, and certain powers over some of the pews; the legislature may have allowed that as some inducement to encourage persons to devote their wealth to charitable or religious purposes; but this cannot alter the nature of the edifice. To import the word "*hereditament*," then, into the 82nd section would be directly contrary to the intention of the legislature, and it would rather seem that where it appears it has been inserted inadvertently; and in short, the same argument which is used to shew the church in question rateable, would equally apply against the parish church itself.

There is also in the act language still more direct. The 143rd section enables the commissioners to levy

money annually by rate to be levied upon the tenants or occupiers of houses, warehouses, &c. and other buildings, yards, gardens, lands, and tenements within the township, according to the annual rent or value of the same. There the language is more general than in the 82nd section; because a much wider range of persons is to be benefited by the purposes for which that general rate is to be made than that in the 82nd, and yet there the rate is to be in proportion to the rents, which shews that it means premises to be beneficially occupied in the ordinary sense. The 149th section provides, that "no rates or assessments shall be charged on any person for any arable, meadow, or pasture land within the township, or for or on account or in respect of any church or chapel within the said township, or any meeting-house duly licensed for religious worship, or any almshouse or hospital, or for any building or part or parts of any building used, occupied, and appropriated exclusively for the gratuitous education of the poor, or for any public charity." There is the express language of the legislature, that property of this description shall not be liable to the general rate, and *à fortiori* to the rate in question, which indeed may, perhaps, be included in this general language, because the charge is in the nature of an "assessment," if not an actual "assessment" (a). In *Douglas v. Chalk* (b), which was the case of a watching and lighting act, by which the commissioners were enabled to make rates upon "all houses, shops, warehouses, coachhouses, stables, cellars, vaults, buildings, and tenements in any of the said streets, &c.," not to exceed a certain proportion of the rent; it appears to have been admitted by *Channell*, Serjt., arguendo, that the language would not include a church. In fact, if a church is included in the language of sect. 82, it seems to follow that the power of distress and sale given by the same section may also be exercised in the body of the church itself.

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(a) See per Cur., 7 Ad. & Ell. 275, in *Emerson v. Saltmarsh*.

(b) 4 Scott, N. R., 250.

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Then, secondly, even if the church be a "building" within the meaning of the 82nd section, the defendant is not the "owner." He cannot be more of an owner than Dr. Burton would have been if there had been no mortgage; and if there be any owner, it must be Todd and Orford, the trustees. The defendant is not the mortgagee under them, and they are in possession (if any one is) of the building, &c.; for the pew-owners &c. have only an easement. The parties are like the owners of the soil of a highway, who may bring trespass. Whatever the language of the deeds may purport to pass, it is plain that Dr. Burton had merely a right to sell the liberty of sitting in the church, or of burial in the churchyard or vault. But he had in him no ownership of the church or soil of the churchyard: the consecration deed could give none. The mortgages only purport to convey the "rents and profits;" those words convey no land; the marriage fees &c. might almost as well be called land. To exempt the church from the rate is only carrying out the same system by which the legislature exonerates all buildings &c. set apart for public purposes, from poor rates and other burthens.

Martin replied.

PARKER, B.—I am of opinion that the defendant is entitled to judgment. The declaration alleges, that the defendant was and still is in possession of the said buildings, grounds and lands, as the mortgagee thereof; and an issue having been raised upon that allegation, we are called upon to pronounce whether he was in possession of this building, ground, or land, as such mortgagee. The situation of the defendant is this: Dr. Burton had purchased a plot of ground, which now forms the centre of the square, for the purpose of erecting a church upon it, and had afterwards conveyed it to Messrs. Todd & Orford, as trustees, for the purpose of procuring it to be consecrated. The church was accordingly consecrated, and the duties of the trustees (for I think the legal estate still continued in them) and the rights

of the clergyman, who was to officiate in that church, are pointed out by the consecration deed. There was also reserved to Dr. Burton, who was to be the clergyman, his heirs and assigns, a right to sell and dispose of all the pews then erected in the church, which were not thereafter particularly appropriated, together with the vaults under the church, and the ground in the churchyard, except one portion of the churchyard, which was reserved for the burial of the poor. Now, Dr. Burton appears to have mortgaged, first to Mr. Collins, and afterwards to Miss Orred, such rights as he had not exercised. He did not renounce all the rights he acquired under the consecration deed, because he sold some pews, and then mortgaged those not sold, together with the remainder of the vaults already granted, and the right to grant future vaults and spaces in the churchyard. He then made a second mortgage of the residue of the same rights to the defendant, who afterwards made an agreement with Miss Orred, by which he took possession of all that was mortgaged to her, agreeing to give her £500 a year, but to be in actual possession of all those rights.

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Now, to the extent of such rights as were pledged by the second mortgage by Dr. Burton, I consider the defendant must be deemed to be mortgagee in possession; for what is his situation? He is mortgagee in possession of a right (perhaps descendible to heirs), on the part of Dr. Burton, to dispose of the vaults under the church, of such pews as were not disposed of, and also to dispose for money of the right of interment in a portion of the churchyard. But can he in any sense be considered mortgagee in possession of the *land*, being, in fact, nothing more than mortgagee in possession of the hereditaments arising out of a portion of the land? He has nothing to do with the portion of the church assigned as pews to other persons, nor has he any thing to do, except to receive the rents of that portion of the churchyard and the vaults, which have been before disposed of to other persons: nor has he any right to de-

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rive any species of profit out of that portion of the church-yard which was reserved for burying the poor. He is mortgagee of an hereditament, beneficial to a certain extent, arising out of land which was contiguous to the streets. I think, therefore, that he can in no way be considered as the owner of houses, buildings, or land adjoining the street in question. Whether he would have been liable in this action, supposing him to have been charged as mortgagee of the hereditaments arising out of the land, is a question that we need not decide; but I feel no difficulty in saying that he would not, and that if this declaration had charged him as mortgagee of that hereditament, it would not be valid on the face of it, because I construe the 82nd section according to the words of it. Every statute is to be construed according to its grammatical sense, unless there is something in the context which shews that the words are to be understood in a different sense from what they import. The word "hereditaments" is not to be found in that part of the section which makes parties liable to the expenses of constructing a new road. But it is said that the word "hereditaments" has slipped out of the act through mistake. I cannot assent to that. On the contrary, I think it has slipped by mistake into those clauses where it appears, having been copied from some other act of Parliament, where it was used to refer to some particular description of property before mentioned, which was comprised under the word "hereditaments." Whether or not the trustees, who have the legal estate—for it never got out of Todd and Orford by reason of the consecration deed—would be liable as owners of the land adjoining the street, is a matter which we need not determine at present, though, I must confess, Mr. *Cowling's* argument on that subject leads me to entertain very great doubt whether the opinion that I threw out in the course of the argument, that they were to be considered as owners, because they had not parted with any beneficial right in the property, could be maintained. I think there is a great deal in the

argument that this act does not mean to charge any but those persons who are owners for the purpose of deriving ordinary temporal profit from the subject of the property of which they are the owners. Indeed, I feel no doubt that that is so. I think, therefore, upon these grounds, that the defendant is entitled to our judgment.

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ALDERSON, B.—I am of the same opinion. It seems to me, that the defendant is not mortgagee of either houses, building, ground, or land. These words were intended by the act to be taken in their ordinary sense. The object of the act was, that owners and persons of that description should contribute to the making of the sewers and pavements in the neighbourhood of their property; it would therefore naturally be understood as applying to houses, buildings, ground, and land, in the ordinary sense of the words, namely, to that species of property which would immediately be benefited by the sewerage and paving of the place in question. I am not disposed to construe acts of Parliament for the purpose of introducing nice questions as to what are “tenements” and “hereditaments” in the strictest sense of the terms. I agree with Mr. *Cowling*, that this act was intended to be enforced by persons not of a legal character, and who would therefore understand the words in their ordinary sense. I also agree with my Brother *Parke*, in supposing that the word “hereditaments” has slipped in by mistake, and not slipped out of the act of Parliament.

GURNEY, B., concurred.

ROLFE, B.—I am of the same opinion. The only question is, whether or not Dr. Burton is, within the meaning of this act of Parliament, the owner of the lands in question. If he is not, then it is clear that, although the present defendant is mortgagee of whatever was possessed by Dr. Burton, he is not mortgagee within the meaning of

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the act of Parliament. Now, to determine whether Dr. Burton was or was not the owner of the land within the meaning of the act, let us consider what was his interest. He was clearly the owner of the land before the month of February 1820. In that month it is certain that he ceased to be the owner of the land, in the ordinary sense of the word, because he conveyed it for a particular purpose to Todd and Orford. Did he become the owner again by the deed of consecration? That is the point that the plaintiffs must establish. What interest did he take under that deed? He took this interest, that the property having become a church and churchyard, he was to have the privilege of granting for his own private advantage the right of burial there, subject to certain restrictions—not of burying there absolutely, but in three-fourths of the land in question, for one-fourth was reserved for the poor. Did that per se make him the owner of that land? It would be absurd to say that it did. In some places, to make such a grant would be to grant what was utterly valueless; as, for instance, if a grant were made of burying on Salisbury Plain or Newmarket Heath. In the present case, the right has become a valuable one, but that does not make the grantee the owner of the land; it merely makes him the owner of something, which, though not valuable when first acquired, has since become so. It is clear that this act of Parliament contemplated merely a charge on those persons who were in the ordinary sense owners of the land; and as the defendant is not such a person, I think he is entitled to our judgment. To treat the defendant as owner of the whole would be great injustice, because he had no benefit from the belt of the churchyard in which the poor were buried, and yet he would be rated according to the outer frontage, whilst the frontage of the inner part, in which alone he was beneficially interested, would be much smaller.

Judgment for the defendant.

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THE first count of the declaration stated, that before and at the time of the making of the agreement and promise next thereafter mentioned, the plaintiff was possessed of, and had possession of, divers goods, to wit, 2000 hats, of the value, to wit, of £1000, which goods then were the property of the defendants, subject to a lien which the plaintiff then had thereupon, the said lien then being of great value, to wit, of the value of £250; and thereupon, before the commencement of this suit, to wit, on the 23rd day of July, 1842, it was agreed between the plaintiff and the defendants, that the plaintiff should deliver up to the defendants the said goods, and abandon his said lien thereon, and that the defendants should therefore pay the plaintiff the sum of £250, upon the delivery of the said goods to the defendants; and thereupon afterwards, to wit, on the day and year last aforesaid, in consideration of the premises, and that the plaintiff, at the request of the defendants, had then promised the defendants to perform the said agreement in all things on the part of him the plaintiff, the defendants then promised the plaintiff to perform the said agreement in all things on the part of them the defendants. And the plaintiff says, that afterwards, and after the making of the said agreement and promise, and before the commencement of this suit, to wit, on the day and year last aforesaid, the plaintiff was ready and willing, and then tendered and offered to deliver up the said goods to the defendants, and to abandon his said lien thereon, and then requested the defendants to accept the said goods, and the said abandon-

Assumpsit on a promise by the defendants to pay £250 on the plaintiff delivering up certain goods, to wit, 2000 hats, on which he had a lien, and the declaration alleged that the plaintiff was ready and willing, and tendered and offered, to deliver up the hats, and to abandon his lien, but that the defendants refused to accept them. Plea, that the tender was of two closed casks, which the plaintiff represented contained the said hats, which was the readiness and willingness in the declaration mentioned; but that the defendants did not then, or at any other time, know, nor could they ascertain, the contents of the said casks, or whether the same contained the said hats, nor had they

any opportunity of inspecting the contents of the said casks, and although the plaintiff was requested by them to open the casks and allow them to examine the contents thereof, and although the plaintiff had notice that they were willing to accept the hats and to pay the money, yet the plaintiff refused to permit the casks to be opened or to allow them any inspection of the contents thereof:—*Held*, on special demurrer, that the plea was bad, as being an argumentative denial of the tender.

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ment of the said lien of the plaintiff, and to pay the plaintiff the said sum of £250 ; and although the plaintiff has always performed the said agreement in all things on his part, yet the defendants, not regarding their said promise, did not nor would, when they were so requested, or at any time before or since, accept the said goods or any of them, or the abandonment of the said lien of the plaintiff, or pay the plaintiff the said sum of £250, or any part thereof, but then and always neglected and refused so to do.

The defendant pleaded to the said first count, secondly, that the said hats in that count mentioned were certain hats which one Arthur Jarrett, before he became bankrupt, had deposited with the plaintiff, upon certain good considerations, arising upon dealings and transactions then had between the plaintiff and the said Arthur Jarrett ; and that the said agreement in the said first count mentioned was made and entered into between the plaintiff and the defendants, respecting the said hats so deposited as aforesaid, without the defendants, or any person on their behalf, having at any time had any means or opportunity of inspecting or examining the same, or any part thereof, and without any such inspection or examination ; and further, that they, the defendants, were always from the time of the making of the said promise and agreement ready and willing, and desirous to accept and receive from the plaintiff the said hats, which had been so deposited by the said Arthur Jarrett with the plaintiff, as aforesaid, and upon which the plaintiff had such lien as in the said first count mentioned, and to pay to the plaintiff the said sum of £250, upon the delivery of such hats to the defendants ; and that the plaintiff, after the making of the said agreement, to wit, on the day and year in the said first count in that behalf mentioned, offered to deliver to the defendants divers, to wit, two closed casks, which the plaintiff then represented and alleged to the defendants contained the said hats which had been so deposited by the said Arthur

Jarrett with the plaintiff as aforesaid, which is the same alleged readiness and willingness of the plaintiff to deliver up the said hats to the defendants, and to abandon his said lien thereon, as in the said first count mentioned, and the same alleged tender and offer therein in that behalf mentioned. But the defendants in fact further say, that the defendants did not, nor did either of them, at the time of such offer, or at any other time, know (save from the said representation of the plaintiff as aforesaid), nor could they ascertain what were the contents of the said casks, or either of them, or whether the same, or either of them, in fact contained the said hats; nor had the defendants, or either of them, at any time, any means or opportunity of inspecting or examining the contents of the said casks, or either of them; and although the plaintiff, before and at the time of the said supposed breach of promise of the defendants, in the said first count mentioned, to wit, on the day and year therein mentioned, was requested by the defendants to open the said casks, and to permit and allow the defendants to inspect and examine the contents thereof, and to ascertain whether or not the said casks did in fact contain the hats which had been so deposited with the plaintiff as aforesaid; and although the plaintiff then had notice, as the fact was, that the defendants were then ready and willing to accept and receive the said hats, and to accept and receive the said casks, upon being satisfied that the said hats were in fact contained therein, and thereupon to pay to the plaintiff the said sum of money in the said first count mentioned; yet the plaintiff then and from thence hitherto wholly refused to permit the said closed casks to be opened, or to allow to the defendants, or to any person on their behalf, any inspection or examination of the contents thereof; and the said casks always, until and at the time of the said supposed breach of promise in the said first count mentioned, remained and were wholly closed and fastened, and the contents thereof unknown to and unseen by the

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defendants, wherefore the defendants did then, as they lawfully might, refuse to accept or receive the said casks, or to pay to the plaintiff the said sum of £250 in the first count mentioned, which is the same supposed refusal and breach of promise, whereof the plaintiff hath therein complained against the defendants. Verification.

Special demurrer, assigning for causes, that the said second plea contains an argumentative traverse of the averment in the said first count of the plaintiff's readiness and willingness to deliver up, and of his tendering and offering to deliver up to the defendants, the goods in the said first count in that behalf mentioned, and to abandon his lien thereon; the goods which the plaintiff is in the said first count averred to have been ready and willing to deliver up and abandon his lien upon, being, by necessary intendment and construction of the said first count, the very goods concerning which the said agreement in the said first count mentioned was made. That the said second plea contains an argumentative traverse of the breach alleged in the said first count; the goods which the defendants are therein alleged to have refused acceptance of being, by necessary construction and intendment of the said first count, the very goods concerning which the said agreement in the said first count mentioned was made. That the second plea is an argumentative traverse of the allegation contained in the said first count, of the plaintiff's having performed the said agreement in the said first count mentioned, in all things on the part of the plaintiff. That the said second plea ought, for the reasons before stated, to have concluded to the country, or with the formal and special traverse *absque hoc &c.* That the said second plea is an argumentative traverse of the defendants' promise, alleged in the first count, which is to accept the said goods absolutely, and not subject to the defendants' right of inspection thereof, and therefore amounts to the plea of the general issue. That the said second plea is bad, because the mat-

ters therein stated constitute no excuse for not accepting the said goods, inasmuch as the defendants might have rescinded the said contract, if on inspection of the said goods it should have been found that they were not the very goods concerning which the said agreement was made. That the second plea is bad, inasmuch as it is no answer in law to the actual breach alleged in the declaration, which is not that the defendants did not pay for the said goods, but that they did not accept the same; and that the said second plea is otherwise insufficient.

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Byles, in support of the demurrer.—The plea is bad for uncertainty and ambiguity. It may mean either that the hats were in the casks, or that they were not. If it means that the hats were not tendered, then it is an argumentative traverse of the tender and of the breach; if, on the contrary, it means that the hats were tendered, then it shews that the plaintiff has performed his contract. It may perhaps be argued that the plea is in confession, and seeks to avoid the contract, by alleging that there was an implied condition to inspect the hats, which was not performed, but that is no answer to this declaration, which does not set out the agreement in *hæc verba*, but states the legal effect of it; and if there was an implied condition that the defendants should have an opportunity of inspecting the goods, the plea should have set it out. In *Smart v. Hyde* (a), which was an action on the warranty of a horse, the defendant pleaded that the mare was sent to a repository for the sale of horses, to be sold according to certain rules, which provided that a warranty of soundness should remain in force until the noon of the day after the sale, when it would be complete, and the responsibility of the seller terminate, unless in the mean time a notice and

(a) 8 M. & W. 723.

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certificate of unsoundness was given; and the plea averred that the sale took place subject to the rules, and that the same were agreed to by the parties, and that such notice and certificate were not given within the time limited; and it was held that the plea was good, on the ground that it was consistent with the contract stated in the declaration. But this case is distinguishable, for here the plea is not consistent with the contract stated in the declaration; but even if it were clearly a plea in confession and avoidance, it would be bad for not setting out the condition. But the plea rather assumes that the hats were not tendered. [*Parke, B.*, referred to *Pettit v. Mitchell (a)*, where on a sale by auction of certain woollen goods, the catalogue described them as containing a certain number of yards, and by the conditions the purchasers were to pay down merely a deposit in part payment for each lot; the lots were to be taken away, with all faults, imperfections, and errors of description, on the Saturday after the sale, and the remainder of the purchase-money was to be paid before delivery; and it was held that the law would imply no condition on the sale that the purchasers should have a right, before paying the balance of the purchase-money, to inspect or measure the goods, for the purpose of ascertaining whether they corresponded with the description in the catalogue.] That question does not arise here, because the declaration must set out the legal effect of the contract. If there was an implied condition that the defendants should have an opportunity of inspection, it ought to have been alleged in the plea.

Ball, contra.—The plea is good. It shews that which is a good answer to the action, namely, that the plaintiff delivered the casks which he represented contained the hats, in such a manner that the defendants had no oppor-

(a) Not yet reported, except in *L. J.*, vol. 12, (N. S.), C. P. 9.

tunity of inspecting them, or of ascertaining whether they were those he bargained for or not. In *Lorymer v. Smith* (a), it was held that the buyer of a parcel of wheat by sample has a right to inspect the whole in bulk, at any proper and convenient time; and if the seller refuses to shew it, the buyer may rescind the contract. There *Abbott, C. J.*, says: "Here the buyer desired to see the whole of the wheat in bulk, but the seller refused to shew it; upon that refusal, the request having been made at a proper and convenient time, the buyer was entitled to rescind the contract." And *Holroyd, J.*, says: "The buyer had a right to inspect the wheat in bulk, in order to ascertain whether it corresponded with the sample, and might have insisted on having it delivered immediately on tendering a banker's bill for the price." And in *Hibbert v. Shee* (b), it was held that if the bulk does not correspond with the sample, the purchaser is not bound to accept or pay for the goods on any terms. Lord *Ellenborough, C. J.*, there says, "If I buy a commodity wholly discordant to that which is promised me, I am not bound to accept of a compensation for the dissimilarity;" and he adds, "the legal mode of dealing is, that if the article agreed on is not furnished, I may reject it and keep my money in my pocket." This plea is in confession and avoidance: it admits the contract, and avoids it by pleading matter collateral to it. When the goods are tendered, a demand is made to inspect them, which is refused; is not that a good answer, and may it not be set forth as such in pleading? The defendants in substance say, "it is true we made the contract you allege, but when you tendered the hats, we demanded an inspection, which you refused." If the tender alone had been traversed, the facts would have entitled the plaintiff to a verdict. *Smart v. Hyde* (c) is very similar to the present case. There *Parke, B.*, says, "It [the

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(a) 1 B. & C. 1; 2 D. & R. 23. (b) 1 Camp. 117. (c) 8 M. & W. 443.

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plea admits the contract and the promise, but shews it to have been made subject to certain rules which have not been complied with." He also cited *Wyld v. Pickford* (a).

PARKER, B.—I think the plea is bad, as it merely amounts to an argumentative denial that a tender was made. The obvious meaning of the declaration is, that the plaintiff was ready and willing to perform his part of the contract, and that he did all in his power to perform it, but that the defendants would not accept the hats when tendered. Then the plea is not in confession and avoidance, but in answer it proceeds to shew that, according to the nature of the contract, the defendants were entitled to an opportunity of inspecting the hats on delivery. That they had such opportunity is implied in the allegation of a tender having been made. The case is analogous to a tender of money, which is not properly tendered when locked up in a box, so that the party to whom it is shewn cannot open it or see the contents. There can be no doubt, therefore, that this plea amounts to an argumentative denial of the allegation in the declaration, that a tender had been made of these goods. In order to prove that allegation, the plaintiff would be bound to shew a delivery under such circumstances, that the defendants had an opportunity of seeing that the article delivered to them was the one they had stipulated for.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

(a) 8 M. & W. 443.

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HUMBERSTONE v. DUBOIS.

REPLEVIN for taking the plaintiff's goods in a certain dwelling-house.

Cognizance by the defendant as bailiff of one Thomas Wright, alleging a seisin in fee of the *locus in quo* in the Marquis of Westminster; an unexpired lease granted by him to Joseph Thompson; and an assignment of such lease by Thompson to the said Thomas Wright. It then alleged a demise by Wright to the plaintiff, of certain apartments in the dwelling-house mentioned in the declaration, being a house on the said demised premises, "to hold the same as a *yearly* tenant thereof, that is to say, as tenant thereof to the said Thomas Wright *from quarter day to quarter day* for so long a time as they the said plaintiff and the said Thomas Wright should respectively please, at and under a certain quarterly rent, to wit the rent of 6*l.* 5*s.* payable quarterly on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, in each and every year during the continuance of the said tenancy. By virtue of which said last-mentioned demise the plaintiff afterwards, and before the said time when &c., to wit, on the day and year last aforesaid, entered into and upon the said rooms and apartments, so being in and parcel of the said dwelling-house in which &c., with the appurtenances, and became and was possessed thereof, and being so thereof possessed, afterwards and before the said time when &c., to wit, on the 24th day of June, 1841, she the plaintiff, *then having the power to determine her said tenancy by giving such notice to quit as hereinafter mentioned*, gave to the said Thomas Wright notice that she the plaintiff would quit and deliver up possession of the said rooms and apartments, so by her holden as aforesaid, on the 29th day of September in the year

In a cognizance by defendant as bailiff, for *double rent*, under the 11 Geo. 2, c. 19, s. 18, the terms of the tenancy, and of the notice to quit, should be so shewn, that the tenant's power to determine the tenancy by notice to his landlord for that purpose, and the sufficiency, in law, of the notice actually given, may appear. It is not sufficient (on *special demurrer*) to allege that the tenant "*having power to determine by such a notice as hereinafter mentioned*" gave a notice to quit on a given day past.

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aforesaid. And the defendant further saith, that the plaintiff did not nor would, on the day and year last aforesaid, quit or deliver up possession of the said rooms and apartments according to the said notice, but then refused so to do, and on the contrary thereof, without the consent of the said Thomas Wright, held over and continued possession of the said rooms and apartments from the day and year last aforesaid, until and at the said time when &c., although the said Thomas Wright, for and during all that time, was entitled to the possession thereof from the plaintiff; whereby the plaintiff then became liable to pay to the said Thomas Wright, during the time the plaintiff continued in possession of the said rooms and apartments, after the said 29th day of September in the year aforesaid, the quarterly rent of 12*l.* 10*s.*.. being at the rate of *double the rent or sum which she the plaintiff would otherwise have paid* in case the said notice had not been so given." The defendant then made cognizance for double rent for a quarter of a year, after the 29th day of September mentioned in the notice to quit.

To this cognizance there was a special demurrer. After objecting to the repugnancy in the statement of the tenancy, (which was called a "yearly," though shewn to be a "quarterly" tenancy), the plaintiff assigned the following cause of demurrer: "that it is not shewn with sufficient certainty, *how the plaintiff had the power of determining her tenancy* by such a notice as she is stated in the said cognizance to have given."

Atherton, in support of the demurrer.—The objection on which the plaintiff mainly relies is the omission, in the cognizance, of any statement of matter of fact, shewing *how* the plaintiff had power to put an end to her tenancy, by the notice given. This cognizance is founded on the 11 Geo. 2, c. 19, s. 18, entitling a landlord to double rent from a tenant holding over after a determination of the

tenancy by notice for that purpose, given by the tenant to his landlord. Now, to bring a case within that statute, these things must concur: first, a tenancy determinable by notice from the tenant to the landlord; and secondly, a notice accordingly, given by the tenant to the landlord, and being a notice sufficient in law to put an end to such tenancy. And in order to shew these things aptly in pleading, the defendant should have stated separately the terms of the tenancy, so far as regards its determinability by notice to quit, and the terms also of the notice to quit actually given. These two matters of *fact* being so stated that the plaintiff might traverse either of them, a conclusion of *law* would appear: it would be seen, that is to say, whether, given such terms of tenancy, and given a notice to quit in such terms, the tenancy would have been put an end to by the notice. The plaintiff ought to have had an opportunity, by demurrer, of raising on the record this question of legal sufficiency. Here, however, the defendant has merely said that the tenant "had *power*" to determine the tenancy by such a notice as she gave. This is stating, in one single and indivisible allegation, two distinct matters of fact and one matter of law; and the plaintiff, were she to take issue, and deny that she had such "power" as alleged, would be traversing double as to matter of fact, and moreover putting in issue matter of law. For whether such "power" did or did not exist depended on the terms of the tenancy in fact, the terms of the notice in fact, and the sufficiency of the notice in law, assuming the foregoing facts. The tenancy described being, in substance, a *quarterly* tenancy, the law does not, as in the case of a tenancy from year to year, supply, as a *legal incident*, the power to determine by notice to quit.

Then, there is the incongruity in describing a "quarterly" as a "yearly" tenancy: but this, unless necessary, it is not intended to insist on.

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The Court then called on

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Gurney to support his cognizance, in answer to the objection that the terms of the tenancy and notice were not shewn.—He contended that a quarter's notice was alleged to have been given: it being averred that on the 24th day of June a notice was given to quit on the following Michaelmas day. [*Alderson*, B.—The 24th day of June is a formal time only, and is laid under a *videlicet*. The cognizance means merely that a notice was given *some time*, to quit at Michaelmas 1841. *Parke*, B.—Can you get over this objection? Had you not better amend, if you wish to try the question?]

Gurney admitted that he could not meet this objection, and had leave to amend on payment of costs, otherwise

Judgment for the plaintiff.

Dec. 9.

HARRISON v. MATTHEWS.

Debt.—The declaration stated, that by an indenture made between J. H. of the first part, G. M., the defendant, of the second part, W. A. the elder, of the third part, W. A. the younger, of the fourth part, and the plaintiff of the fifth part, the defendant covenanted with the plaintiff that the defendant, the said J. H., W. A., and G. M., their heirs, executors, and administrators, or some or one of them, should or would pay or cause to be paid unto the plaintiff, his executors, &c., £300:—*Held*, that this was a collateral covenant, and that the action for the recovery of the money ought to be in covenant and not in debt.

DEBT.—The declaration stated, that by a certain indenture, made between J. Hartley of the first part, the defendant of the second part, W. Ashcroft the elder of the third part, W. Ashcroft the younger of the fourth part, and the plaintiff of the fifth part, the defendant covenanted with the plaintiff that they the defendant, the said J. Hartley, W. Ashcroft, and G. Matthews, their heirs, executors, and administrators, or some or one of them, should or would pay or cause to be paid unto the plaintiff, his exe-

cutors, &c., the sum of £300 and interest. Breach, that the defendant did not, nor did the said J. Hartley, W. Ashcroft, and G. Matthews, or any or either of them, or any other person, pay the said sum of £300 and interest on &c.

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Special demurrer, on the ground that the covenant being collateral, an action of debt would not lie.—Joinder in demurrer.

Erle argued in support of the demurrer (June 17).—The covenant stated in the declaration is not a direct covenant to pay money, but a collateral covenant that the defendant and other persons will pay the plaintiff the sum of £300, and it does not appear that those third parties executed the instrument. The action ought therefore to have been in covenant instead of debt. In *Randall v. Rigby* (a), where lands were enfeoffed to Richard Hollins and the defendant, to the use, intent, and purpose that the plaintiff, his heirs and assigns for ever, should receive and take out of the lands a yearly rent of £63, payable half-yearly; and the defendant covenanted with the plaintiff that R. H. and the defendant, their executors, &c., or some or one of them, would pay or cause to be paid to the plaintiff, his heirs and assigns, the said yearly rent at the time appointed for payment thereof; it was held that the plaintiff could not sue the defendant in debt for arrears of the annuity. This case is distinguishable from *Evans v. Jones* (b), where it was held that debt would lie, for in that case there was an absolute covenant to pay a sum certain on a given day. *Cloves v. Williams* (c) also shews that the action ought to have been covenant, and that debt is not maintainable.

Humfrey, contra.—This action is well maintainable, for

(a) 4 M. & W. 130. (b) 5 M. & W. 295. (c) 3 Bing. N. C. 868.

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the covenant is an absolute and not a collateral one. It is an absolute covenant that he the defendant will pay, or that some one else shall. It is not a case in which he undertakes to do a collateral act, if another does not. *Randall v. Rigby* is in favour of the defendant. Lord *Abinger*, C. B., in giving judgment, says, "If it had appeared that this was a debt of his own, on which he was liable to the plaintiff, debt might be maintainable as well as covenant; but it is an action on a *mere collateral* covenant, by which the defendant jointly with another undertakes to *secure the payment* of an annuity which is issuing out of land." And *Parke*, B., says, "It is not a covenant to perform any direct duty, but only a collateral one to secure payment of the rent." Now try it by that test—is not this a direct duty, in the first instance, to pay the money? Most clearly so. It is an absolute covenant to pay the money; and it is not the less absolute, that the defendant covenants that he or another shall pay. [*Parke*, B.—It is said to be a joint debt, but I do not know that it is.] Assuming it to be a joint debt, is there not a direct duty to pay the joint debt? This case falls precisely within the decision in *Evans v. Jones*, where it was held that debt lies on an absolute covenant by A. to pay on a certain day a sum certain due from B. on mortgage. [*Alderson*, B.—Would the declaration have been good, if it had simply averred that the defendant had not paid the money? Because if it was his duty to pay it, his not paying is a breach of that duty.]

Erle, in reply.—The covenant is in effect a conditional one, that, if the other parties named will not pay, the defendant will. In *Viner's Abr.*, Debt (D), pl. 3, it is said that debt will not lie "if the covenant is conditional, as thus, viz. that if C. do not pay to B. £10, A. will pay it." [*Alderson*, B.—The liability in that case does not arise until one has not paid. Here it does; all are liable—some

or one of them. *Parke, B.*—It does not appear here that the defendant is a surety.] The plaintiff might have shewn by averment that the defendant was not a surety. It does not appear on the face of the instrument that it was a direct duty. If you were to strike out of the averment here the allegation that the other parties had not paid, the defendant might demur, on the ground that it did not appear that they had not paid. [*Alderson, B.*—That is the difficulty I have felt, that it is not a sufficient breach that one has not paid. *Parke, B.*—The difficulty here is, that we do not know upon which of the four the duty is cast.] In *Evans v. Jones*, the form of the covenant was not that one or the other would pay, but that they, the defendants, would pay. An alternative covenant is a conditional covenant.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The Court, feeling very great doubt whether the action of debt was maintainable upon the facts stated in the first count, desired the plaintiff to amend, thinking it probable that the indenture was really executed by Hartley and the two Ashcrofts, as well as by the defendant, and that all four covenanted to pay the sum of £300, in which case an action of debt would undoubtedly have lain against the four; and against one, if the one sued did not plead in abatement.

The plaintiff declining to amend, we are now to pronounce the judgment of the Court on the record as it stands.

It is well settled, that if there be a covenant by the defendant that he will certainly pay a sum certain, debt will lie; and that it will, although the same sum is by the same deed secured by a mortgage: *Evans v. Jones (a)*. On the

(a) 5 M. & W. 295.

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other hand, if he covenant that another shall pay a certain sum, and if not, that the defendant will, debt will not lie: *Wentworth's Office of Executor*, 128, Vin. Abr., Debt, (D). And on the same principle, it will not lie (after assignment assented to by the lessor) on the lessee's covenant that his assigns shall pay rent, the proper remedy being an action of covenant. Again, it is said, in *Wentworth's Office of Executor*, 128:—"So, perhaps, if the covenant be in the disjunctive, as to do such an act, or to pay £10, debt will not lie, though the act be not done, but covenant only." If the law is correctly laid down in these authorities, as we think it is, they appear to us to warrant a judgment for the defendant.

In this case, we cannot assume that Hartley and the two Ashcrofts executed the indenture, or that, if they did, they covenanted jointly with the defendant to pay the sum of £300, or that there was any recital in the indenture (which would have bound the defendant) that the £300 was advanced to or was a joint debt of the defendant Hartley and the Ashcrofts.

We must deal with the case as if the legal effect of the covenant was properly set out in the declaration, and may treat the question as if it had arisen nakedly on a covenant by the defendant, that *he and J. S.*, a stranger, (for the number of other persons is immaterial,) their heirs, executors, and administrators, or one of them, should pay the sum of £300 on a certain day.

This seems to us to be the same as if the defendant had covenanted that he, or that J. S. or he, should pay, and to be governed by the principle of the authority above mentioned. It is in substance and effect the same as a covenant to pay if J. S. did not, and therefore an action of debt will not lie upon it.

Our judgment is therefore for the defendant. We feel sorry to come to this conclusion, because we are well satis-

fied that the action could have been maintained, if the pleadings had been proper, and the legal effect of the covenant had been set out.

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Judgment for the defendant.

THE MAYOR, ALDERMEN, and BURGESSES of the City of
COVENTRY v. EDMUND LYTHALL, WILLIAM WILSON,
THOMAS ELTON, WILLIAM SERJEANT, THOMAS GEORGE
CHEADLE, PETER CHEADLE, jun., WILLIAM CAMWELL,
JOSEPH VOILE, and JOHN BRAY.

EIGHT several actions of trespass having been brought by the above respective defendants against the Mayor of Coventry, to try the validity of as many distress warrants, issued by that officer, for levying, within the places mentioned in the various counts of the feigned issue afterwards referred to, the borough rate, made under the 5 & 6 Will. 4, c. 76, s. 92; by an order of *Alderson*, B., proceedings in those actions were stayed, and a feigned issue directed to be tried in lieu thereof; the parties consenting to be bound in the actions by the event of the corresponding issues. The following is the form of the first count of the feigned issue:—"For that whereas heretofore, and after the pass-

By charter of the 18 Edw. 3, the men of the "villa" of Coventry, tenants of the Queen Mother of the manor of Chilesmore, in Coventry, were incorporated. The corporation consisted of the mayor, bailiffs, and men or commonalty of the villa of Coventry. By that and subsequent charters (some of the King, some

of Isabel, the Queen of Edward III. and others of the Black Prince), various franchises within the villa of Coventry, and throughout the view of Frankpledge of the manor of Chilesmore, and elsewhere, were granted to the mayor and bailiffs of Coventry. By another charter of the 30 Hen. 6, the villa of Coventry, with *Radford*, *Keresley*, and other specified places, were made into a distinct county, called the "County of the City of Coventry." By another charter of the 19 Jac. 1, regulating the government of the corporation, the aldermen of Coventry were made justices of the peace of the county of the city. There were ten aldermen of Coventry, being one alderman for each of ten wards: and the limits of the wards did not appear far to exceed the continuous lines of streets and houses, popularly known as the city of Coventry.

Held, that under the Municipal Corporations' Boundary Act (6 & 7 Will. 4, c. 103, s. 1), places being within the county of the city of Coventry, and through which the mayor and bailiffs of Coventry had a coroner, and other franchises, under the above charters, but being beyond the lines of such streets and houses, and not within any of the wards of Coventry, were not *part* of the city of Coventry.

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ing of a certain act of Parliament made and passed in the seventh year of the reign of his late Majesty King William the Fourth, to make temporary provision for the boundaries of certain boroughs, to wit, on &c., a certain discourse was had &c., wherein a certain question then arose whether, *before and until the passing of an act passed in the Parliament holden in the second and third years of the reign of his said late Majesty King William the Fourth, to settle and describe the divisions of counties and the limits of cities and boroughs in England and Wales, in so far as respects the election of members to serve in Parliament, the parish of Foleshill was part of the said city of Coventry, within the meaning of the first hereinbefore mentioned act of Parliament,* and in that discourse the said plaintiffs then asserted and affirmed that the said parish of Foleshill, before and until the passing of the second hereinbefore mentioned act of Parliament, was as aforesaid part of the said city of Coventry, which assertion and affirmation of the said plaintiffs the said defendants then contradicted and denied, and then asserted and affirmed the contrary thereof. And thereupon afterwards, to wit, on the day and year last aforesaid, in consideration that the said plaintiffs at the request of the said defendants had then paid to the said defendants the sum of £5 " &c. (the usual wager and promise). "And the said plaintiffs further say, that *the said parish of Foleshill, before and until the passing of the said second mentioned act of Parliament, was as aforesaid part of the said city of Coventry, whereof the said defendants afterwards, to wit, on &c., had notice, whereby* " &c. (usual conclusion and breach).

There were seven following counts, in similar terms, and relating respectively to the "parish of *Exhall*," a "part of the parish of *Sowe*," "the parish of *Wyken*," a "part of the parish of *Stivichall*," the "hamlet of *Keresley*," the "parish of *Austey*," and the "parish of *Stoke*." There was also another (a ninth) count, relative to the parish of *Austey*;

but it was unnecessary for the Court to pronounce any opinion on the point which it raised, and it is consequently omitted.

There were pleas to each of the counts, denying that the places in question were "part of the city of Coventry," as alleged in the count: and issues were joined on those pleas.

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These issues came on for trial before a special jury of Middlesex on the 2nd December, 1840, when an order of *Nisi Prius* was made by the Lord Chief Baron, and by consent of parties, for entering a verdict for the plaintiffs, subject to a special case, to be stated for the opinion of the Court by a barrister. The order provided that the Court, in deciding on the special case, should draw the proper inferences from the evidence, and should turn the case into a special verdict, at the request of either party. A case was stated accordingly. In the case, a vast number of charters were shortly stated: admitted copies of the charters themselves being furnished to the Court, and being, by arrangement, open to reference by either party in argument. The said charters were arranged under the following heads, namely,—“Charters and other documents relating to the church of St. Mary, Coventry, and the chapels”—“Charters and grants made to the lay people of Coventry”—“Documents relative to the manor of Chilesmore”—“Charters and grants of King Edward III, Queen Isabel, and the Black Prince, after the Queen and Prince had become entitled to the manor of Chilesmore”—and “Royal charters in favour of Coventry subsequent to King Edward III.” The only charters material to be here stated were the following, namely—1st. A charter of the 20th January, 18 Edward III. This charter states that the King, at the instance of the Queen Mother, tenant for life of the manor of Cheylesmore in Coventry, and in consideration of the Black Prince being, after her, entitled, was willing to make pre-

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eminent the men of the villa of Coventry, tenants of the Queen Mother of that manor: and the King grants to the men of the villa of Coventry, tenants of the said manor, that they should have a commonalty among them, and should elect a mayor and bailiffs, and should have cognizance of pleas, as well of trespasses, contracts, and covenants, as of other matters arising among themselves, within the villa aforesaid. By the same charter the King grants also a seal for recognizances, and a prison within the villa within the tenure of the Queen, for malefactors there apprehended, of which the mayor and bailiffs should have the care. 2nd. A charter of 26 November, 30 H. 6. This charter states that the King, in consideration of his affection for his "*civitas*" or "*villa*" of Coventry, and the mayor, bailiffs, and commonalty of the same, grants to the mayor, bailiffs and commonalty, that the "*civitas*" or "*villa*" of Coventry aforesaid, with *Radford, Keresley, Foleshill, &c.* (enumerating all the places mentioned in the various counts of the feigned issue, besides others) then being within the county of Warwick, shall be one entire county of itself, incorporated in deed and name, and distinct and entirely separated from the said county of Warwick for ever, and not parcel of the same county of Warwick; and that it shall be called the "County of the City of Coventry."—The mayor and bailiffs were to be chosen as before. The bailiffs of the city or villa were to be sheriffs of the county of the city and also bailiffs of the city or villa, as before. The sheriffs of the city were to hold county courts of the city within that city, from month to month, and have all jurisdiction &c., pertaining to the office of sheriff in the said city or villa, the hamlets, parcels and precincts of the same: and the King's writs were to be directed to them &c. The coroner of the city or villa was to be coroner of the county of the city, and the clerk for taking recognizances of debt according to the statute merchant. The mayor

was to have, within the city or villa, hamlets, parcels and precincts aforesaid, the office of clerk of the market of the King's household, and to execute the offices of steward and marshal of the King's household, within the same limits. 3rd. A charter of 18 July, 19 Jac. 1. This charter recites that the city of Coventry was an ancient city and borough, and that the citizens and burgesses of the same city or borough, as well by prescription or custom as by charters and letters patent, had been and were incorporated, as well by the name of mayor, bailiffs and commonalty of the city or villa of Coventry, as by other names. It grants to them that they shall thereafter be a body corporate, by the name of "Mayor, Bailiffs and Commonalty of the City of Coventry," with perpetual succession and a common seal, &c. It confirms to the inhabitants of the city the Council House, and the council of the city to consult there for the good rule and government thereof; and regulates the election of the councillors. It regulates the times and manner of the election of the mayor, recorder, and other officers of the city. It recites that there had been ten wards within the said city; and gives their names as they existed down to the passing of the 5 & 6 Will. 4, c. 76. It recites that there had been an alderman for each ward, and regulates the future election of aldermen. It also provides that the mayor, recorder and aldermen should be justices of the peace within the city, and within the county of the city of Coventry, and the precinct and liberty of the same city and county, as well within liberties as without, and makes various other regulations for the civil government.—Others of the charters referred to contain grants of a *coroner*, *court of pleas*, and other franchises, to the mayor and bailiffs of Coventry; the limits of the franchise varying, sometimes being the villa of Coventry, and at others the view of frankpledge of the manor of Chilesmore, &c.

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The case also adverted to paviage grants, murage grants, rolls of proceedings criminal and civil, as well as to numer-

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ous fines, recoveries, deeds, wills, &c. These documents had been produced by one side or the other, for the purpose of shewing a connexion between the city of Coventry and the places in question, in some instances, and that in others that they had been treated as distinct "*villas*" and places, and for proof of the jurisdiction and authority assumed and exercised by the mayor and bailiffs of Coventry over the places in question, or some of them. The course taken by the Court in giving judgment renders it unnecessary further to allude to these parts of the case.

It was shewn that there were ten wards in Coventry, known, until the passing of the 5 & 6 Will. 4, c. 76, by the names mentioned in the before-mentioned charter of Jac. 1. There did not exist any certain knowledge or reputation as to the extreme limits of these wards; but, at all times within living memory, there had been a general reputation in the city that no one of the wards extended to any of the places mentioned in the feigned issue. At the passing of the Municipal Reform Act, the wards were reputed to contain the streets of the city, and the houses from time to time built either in continuation of the existing streets, or at short distances from them. None of these streets or houses were situate within any of the places mentioned in the feigned issue. "Church" and "Paving and Lighting" Acts were referred to; and much evidence shewn of various particulars (as rights of common, &c.), in which distinctions had been recognised between the freemen of Coventry and the inhabitants of Coventry as comprised within the wards, and the inhabitants of the places in question.

The right of voting for members to serve in Parliament for the city was stated to have been regulated, prior to the Parliamentary Reform Act, by the 21 Geo. 3, c. 54. The right of election was in such freemen as had served seven years' apprenticeship to one and the same trade in the city or the suburbs thereof, and did not receive alms; such

freemen being duly sworn and enrolled, &c. The persons who served their apprenticeship within the streets and houses, which are before stated to have been reputed to have belonged to the wards at the time of the passing of the Municipal Reform Act, had always claimed their freedom, and had been admitted as persons entitled to their freedom, and qualified to vote under the above statute; but no instance was proved of any such claim or admission in respect of apprenticeship served in any of the places mentioned in the feigned issue, although a great number of persons, carrying on trades and taking apprentices, had always, since the passing of the above act of the 21 Geo. 3, c. 54, lived in those places.—In the case there were also statements relative to charities and other matters, to which it is not necessary here further to advert.

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A charter boundary was shewn, called "The Prince of Wales' Boundary," as occurring in a charter of the Black Prince (49 Edw. 3), which it was admitted did not embrace any of the places in question. Another boundary was laid down in a charter of 22 Rich. 2, and the limits of the city walls were shewn; but none of the places in dispute came within these confines.

The case was argued on the 23rd and 24th of June, 1842, by the *Solicitor-General* (*Kenyon* with him), for the plaintiffs, and *R. V. Richards* (*Adams*, Serjt., and *Atherton* with him), for the defendants. The arguments on both sides turned very much on the precise wording of many of the numerous documents brought by the special case before the Court. The substance of these arguments, being given in the judgment of the Court, is omitted here, for the sake of brevity, and as having more of a local than public application and interest.

Cur. adv. vult.

During the same Vacation Sittings, (July 10,) the judgment of the Court was delivered by

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PARKE, B.—In this case we have examined the various facts and documents laid before us for our consideration, and we now propose to state the result at which we have arrived.

These issues raise in fact but one question, and that is whether the five parishes, the two parts of parishes, and the hamlet, which are the subject of them, form a part of the city of Coventry, so as to fall within the operation of the 6 & 7 Will. 4, c. 103, s. 1.

The first point is, what is the true construction to be put on that act. By the former act, 5 & 6 Will. 4, c. 76, certain “liberties” and large tracts of land beyond the limits of the towns had been included within the boundaries of the boroughs, for the purposes of municipal taxation. But this having been found inconvenient and unjust, that part of the act was repealed, and the provision in question was introduced, and it was enacted that no part of any county, or of the liberties of any borough town or city, which did not, before the time of the passing of the 2 & 3 Will. 4, c. 64, form a part of the borough town or city itself, should be taken to be within the metes and bounds of such borough town or city, or within the jurisdiction of its justices, or in fact liable to its municipal taxation.

Now, we think, on full consideration, that the true view of this act is, that those parts of each county of a city or borough, which were in fact the town or city itself, subjected to its ordinary municipal government, bearing its ordinary municipal burthens, and entitled to its ordinary municipal privileges, before the time when the 2 & 3 Will. 4 was passed, are now alone to be deemed liable to the municipal burthens imposed by the 5 & 6 Will. 4, c. 76. And if this be the true construction, we see no difficulty in coming to a conclusion in favour of the defendants.

Secondly, the question as to Coventry is, what portion of the county of the city of Coventry is it which consists of the city itself, and fulfils the conditions to which we before

referred? That portion is alone for the future to be subjected to its municipal burthens, and to the jurisdiction of its magistrates, whose jurisdiction before extended over the whole county of the city.

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Now, although the district which will fulfil these various conditions is not very clearly defined, inasmuch as it may either be confined to the extent of the wards of the city, (which we think the more reasonable limit), or may extend as far as the limits of the Prince's charter, or may include the two original parishes of the Holy Trinity and St. Michael's, yet, at any rate, it is clear from the facts stated in the case, that it does not include any part of the five parishes in question. On this ground alone, therefore, we should be of opinion that the defendants are entitled to our judgment. And we think the same result follows from the mere consideration of the charter of Hen. 6, by which the county of the city was originally constituted. That charter states a grant by the King, that the city or villa of Coventry aforesaid, *with* Radford, Kirtley, Foleshill, Eccleshall, Austey, Callongden, Wykin, Kenby, Lawood End, Stoke, Biggin, Whitley, Pinley, Asthall, Horwell, Harnall, and Whabberly, hamlets of the city or villa aforesaid, and the parcel of Sowe, and the parcel of Stivichall, which are within the liberty of the city or villa aforesaid, and the precinct of the city, villa, hamlets, and parcels aforesaid, (which now are within the county and of the county of Warwick), shall from the feast of St. Michael's next ensuing be one entire county of itself, separated from the county of Warwick, and called the county of the city of Coventry. Now, it is impossible not to see that a plain and broad line of distinction is made between the city or villa of Coventry itself and the districts in question. Sowe and Stivichall are expressly stated to be within the liberty of the city or villa; even supposing (which we do not agree to) that Radford and the other enumerated places are not included within the same words. But even if they are not, they are clearly

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called hamlets of the city or villa, and the subsequent words, "precinct of the city, villa, hamlets, and parcels aforesaid," as well as the prior words, the city or villa of Coventry, *with* Radford, &c., plainly point to a distinction between the city and those hamlets. Now as we are of opinion that the true construction of the 6 & 7 Will. 4, c. 103, s. 1, confines the rights claimed by the plaintiffs to the district of the city or villa of Coventry proper, this charter, which distinguishes between those parishes and that district, makes, as we think, an end of the plaintiffs' case.

But thirdly, we are of opinion, upon the facts stated for our consideration, that the original villa of Coventry never did include any of the parishes in question.

The original incorporation of Coventry under the charter of 18 Edw. 3, was of the "men of Coventry, tenants of the manor of Cheylesmore;" and it was contended by the *Solicitor-General*, that the men of the villa of Coventry, tenant of the manor of Cheylesmore, were in truth all the tenants of the manor, and that the manor and villa were co-extensive. But we see no ground for arriving at such a conclusion. If the villa of Coventry be situate within the manor, and either some or all the men of that villa were tenants of the manor, the words of the charter will have a more natural and full effect. It is clear that the villa of Coventry is situate within the liberty and view of frankpledge of that manor—for it is so described in the grant of 19 Edw. 3 to Queen Isabella. And again in the extract from the Assize Roll, 26 Edw. 3, where the mayor and bailiffs of Coventry claim cognizance, Coventry is thus described: "Coventry, which is situated, as it is said, within the manor of Cheylesmore." And again, when the same parties claim cognizance, 19 Rich. 2, 21 Rich. 2, and 9 Hen. 5, they describe the parties not as residents within the villa, but as tenants and residents within the fee of the manor of Chilesmore, and the view of frankpledge of the

same manor. These are surely more in conformity with the supposition above made, that the villa of Coventry was within, rather than that it was co-extensive with, the manor of Cheylesmore. But the main ground on which the *Solicitor-General* argued that the two districts were co-extensive, arose out of the exercise of the jurisdiction of the coroner at a very early period. By the charter 20 Edw. 3, it appears that the King granted to the mayor, bailiffs and men of the villa of Coventry, tenants of the said manor, the office of coroner *in the same villa*; and certainly at a very early period the mayor and bailiffs have exercised that jurisdiction throughout the whole district in question; and if this were all, it would not be an unfair deduction to make that this shewed that the villa of Coventry had the extent for which the *Solicitor-General* contends. But the learned counsel for the defendants, in answer to this part of the case of the plaintiffs, have laid before the Court, in addition to these facts, a variety of documents connected with the manor of Cheylesmore, which throw great doubt upon the above conclusion. It appears that Queen Isabella for her life, and the Black Prince in fee after her death, were entitled to the manor of Cheylesmore, and that King Edward III. made a grant in the 19 Edw. 3 to the Queen for life and to the Black Prince in fee, which is couched in terms sufficient to carry the right to exercise the office of coroner, by their stewards, or by the mayor and bailiffs of Coventry, or others deputed to them for that purpose, throughout the liberty and view of frankpledge of that manor (a). The Queen afterwards, (19 Edw. 3), by license from the Crown, granted this privilege to the mayor and bailiffs of Coventry for her life; and the Black Prince, (20 Edw. 3), confirmed the grant of the Queen, and made the same grant

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(a) The words referred to in this part of the judgment of the Court, were words of *exclusion*, similar to those occurring in the charter of

23 Edw. 3 to the Earl of Lancaster, referred to in *Jewison v. Dyson*, ante, Vol. 9, p. 540.

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for himself in respect of his reversion in fee, saving, however, to himself all liberties and other things aforesaid *without the villa aforesaid.*

Now, it must be admitted that it does not appear from these documents by what right the mayor and bailiffs of Coventry, after the death of Queen Isabella, exercised the office of coroner out of the villa of Coventry. But sufficient is shewn to raise a not improbable inference, that, having the right by royal grants within the villa, and having exercised it under Queen Isabella's grant during her life to the extent of the manor of Cheylesmore, and having a grant confirming some of these rights from the Black Prince, who survived her, they might continue the exercise of this office of coroner, either by mistake or usurpation, throughout the larger district. And we cannot, from such a doubtful exercise of this franchise throughout the larger district, come to the conclusion, which seems to us inconsistent with the other main facts of the case, that the villa of Coventry was co-extensive with the manor of Cheylesmore. The very charter of confirmation by the Black Prince, which saves to himself the liberties "*without the villa,*" seems to us to shew that there were parts of the manor not included "*within the villa.*" The charter of the same prince in 9 Edw. 3, describes the limits within which his ministers are not to enter and exercise jurisdiction, and affords a strong inference what the boundaries of the villa then were, and these exclude the disputed district. So again, the charter of 22 Rich. 2, which in several places speaks of the villa, and the suburbs of the same, cannot have a full meaning given to the word "*suburbs,*" if the villa itself include, as the plaintiffs contend it does, all the districts in question.

We have before adverted to the charter of the 23 Hen. 6, but it may be mentioned again as bearing materially on this question of fact.

We abstain from going further into a larger detail of the

other facts laid before us, and commented upon with great ability by both the learned counsel who argued this case ; but after fully considering them, and weighing their effect, we have come to the conclusion of fact, that the villa of Coventry never did include within its ambit any of the parishes or places which are the subject of these issues.

Upon the whole, we are of opinion that all the issues must be found for the defendants.

Judgment for the defendant.

IN THE EXCHEQUER CHAMBER.

(*In Error from the Court of Exchequer.*)

COOPER v. LANGDON.

JUDGMENT having been entered up in the Court of Exchequer for the defendant, upon the general verdict awarded for him by the arbitrator in this case (a), a writ of error was brought into this Court, which was now argued by

Peacock, for the plaintiff.—The judgment is erroneous, the verdict for the defendant on the several issues being repugnant and irreconcilable. The verdict on the first issue declares that the defendant made *no* contract ; while that on the third issue affirms that there was a contract,

rescinded ; 4th, leave and license ; and also other pleas alleging deviations from the contract by agreement with and command of the plaintiff. Issues having been joined and taken on those pleas, the cause was at the assizes referred to an arbitrator, who awarded a general verdict to be entered for the defendant. The verdict, and judgment thereon, having been entered accordingly :—*Held*, that the record was not repugnant, so as to afford ground of error.

(a) See 9 M. & W. 60 ; where the pleadings and facts are fully set out.

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Dec. 1.

Assumpsit on an agreement to build a house according to certain drawings, plans, and specifications, and to the satisfaction of the plaintiff, &c. The defendant pleaded, 1st, non assumpsit ; 2nd, that he did the works to the satisfaction of the plaintiff ; 3rd, that before the breach the contract was

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but that it was rescinded by mutual agreement of the parties. To support the latter issue, the defendant had first to prove that some contract between the parties was rescinded; and secondly, to identify it as the contract declared upon. There are many cases to shew that an inconsistent verdict is void: see *Cossey v. Diggon* (a), *Marler v. Ayliffe* (b). If the defendant by his evidence shews the existence of the contract, which the plaintiff had failed to establish, the first issue is proved for the plaintiff; there are two issues, therefore, found for the defendant which could not co-exist. Here, too, the defendant says in terms that the contract was rescinded *after the making of it*. [*Tindal*, C. J.—Suppose the contract were not provable for want of a stamp; yet it is a contract; the stamp acts only prevent it from being received in evidence; and then upon the other plea evidence is given to shew that the contract was mutually receded from:—I see no necessary inconsistency.] But that same evidence proves that the contract once existed. [*Maule*, J.—Suppose the defendant put in a letter from the plaintiff, saying, “I have received yours of yesterday, inclosing a £5 note, and in consideration thereof I agree to rescind *all* contracts heretofore made between us.”] Upon that evidence the jury must find the existence of the particular contract. [*Lord Denman*, C. J.—No—there would be no necessity to inquire as to any particular contract.] The defendant could not properly *identify* the contract, without putting it in evidence and so proving it: *Atkins v. Owen* (c).

Crowder, contra, was not called upon.

LORD DENMAN, C. J.—Strictly speaking, there is no inconsistency on this record. But I do not see how some apparent inconsistency is to be avoided in the mere state-

(a) 2 B. & Ald. 546. (b) Cro. Jac. 134. (c) 2 Ad. & E. 35.

ment of these particular issues. The defendant has a right to say to the plaintiff, Whatever you allege as a contract does not bind me; but even if it does, whatever contract existed, we have mutually abandoned it. Since the statute of Anne, which allows inconsistent pleas to be pleaded, this must occur in many cases. Suppose a special verdict, in which a particular instrument was set forth, and it were for the Court to say whether it amounted to an agreement or not, and they thought it did not; how would that be inconsistent with their also saying that the parties had mutually entered into an agreement to rescind it?

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Judgment affirmed.

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ACCOUNT STATED.

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1. A company having contracted a debt with the plaintiff, and the debt not being paid, he laid an attachment on money of theirs in the hands of bankers. While the attachment was in force, the defendant, representing himself to be a director of the company, called on the plaintiff's attorney for the purpose of making an arrangement about the debt, when it was agreed that the following letter should be written by the defendant to the plaintiff, which was accordingly done: "As director of the B. W. Company, I have to request you will accept the sum of £50 on account of your claim of 116*l.* 19*s.* 7*d.* against the company; and in consideration of your withdrawing the attachment against the funds of the company, I agree, on the part of myself and on behalf of the other directors, to pay you the balance of 66*l.* 19*s.* 7*d.* &c. on the 27th of August next:"—*Held*, that this letter, coupled with the above facts, was evidence of an account stated; and that it was no answer to shew that the defendant was not a member of the company when the original debt was contracted. *Barker v. Birt*, 61

2. Assumpsit by the executors of the payee of a promissory note, against

the defendant as maker. The plaintiff produced the note with the following indorsement upon it, signed by the defendant and one of the plaintiffs:—"Hull, 1838. Memorandum, that the sum of 1*l.* 7*s.* 6*d.*, one quarter's interest, was paid on the within note. William Purdon, Thos. Purdon:"—*Held*, that this was sufficient evidence of an account stated with the executors, without any proof of the time of the testator's death. *Purdon v. Purdon*, 562

ACTION ON THE CASE.

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For what Injuries maintainable.

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ADVOWSON.

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AFFIDAVIT.

(1). *Jurat.*

A rule obtained upon an affidavit, which, in the jurat, was stated to be sworn before "J. L., a Master extraordinary in the High Court of Chancery," was for this defect discharged *with costs*. *Frost v. Hayward*, 673

(2). *Jurat—Erasure.*

The jurat of an affidavit is not vitiated by the erasure of words which form no necessary part of the jurat, and might be separated from it without altering the sense. *Dawson v. Wills*, 662

ANNUITY.

Memorial.

Covenant on an annuity deed alleged to have been made between the defendant of the one part and the plaintiff of the other part. Plea, that the annuity was granted for a pecuniary consideration paid by the plaintiff to A. K., and that no memorial thereof was inrolled in Chancery pursuant to the statute. Replication, setting forth a memorial inrolled in the manner directed by the act of Parliament, but stating the parties to the deed as being the defendant and his wife, A. K., of the one part, and the plaintiff of the other part:—*Held*, on special demurrer, that the memorial was sufficient, and the replication good. *Papineau v. King*, 216

ARBITRATION.

*Award.**Uncertainty—Excess of Authority.*

An action of trespass for an injury to the plaintiff's houses and lands was referred to an arbitrator, who was to settle at what price and on what terms the defendant should purchase the

plaintiff's "property." The order of reference gave no power to the arbitrator to determine what the property in question was, nor was there any dispute on the subject. The arbitrator fixed a certain sum as the price at which the defendant should purchase the plaintiff's property, and ordered that the defendant might use the plaintiff's name to enforce certain rights and remedies:—*Held*, that the award was not bad, on the ground of its not specifying what the *property* was, and that the arbitrator did not exceed his authority in awarding that the defendant should be entitled to use the plaintiff's name. *Round v. Hatton*, 660

ATTORNEY.

(1). *Right of, to prevent Compromise of Suit.*

The attorney of a defendant has no such interest in the suit as to prevent the parties from compromising it without his consent. *Quested v. Callis*, 18

(2). *Summary Jurisdiction over.*

Where an attorney has been guilty of misconduct in the course of a cause, the Court will grant a rule calling on him to shew cause why his name should not be struck off the roll, even although the matter complained of may amount to an indictable offence; but the Court will not, under such circumstances, call upon him to answer the matters of an affidavit. The affidavits to ground an application to strike an attorney off the roll, for misconduct in a cause, may be intitled in the cause, though judgment has been obtained in it. *Stephens v. Hill*, 28

(3). *Signature of Bill.*

A bill, for work done by two attorneys in partnership, was delivered, signed by one of them, in the following terms: "This is our bill. For

self and Robert Owen, J. H. Dixon:"—*Held*, that this was a sufficient signature within the stat. 2 Geo. 2, c. 23, s. 23. *Owen v. Scales*, 657

(4). *Taxation of Bill.*

The Court has no power to refer to taxation an attorney's bill containing taxable items, in an action brought upon it by his executor. *Williams v. Griffith*, 125

(5). *Taxation of Bill—Costs of Taxation.*

Where an attorney has agreed to, or acted upon, an order for the taxation of his unsigned bill, the Court has authority to order him to pay the costs of the taxation, if more than one-sixth be taxed off. *Peters v. Sheehan*, 213

BANKRUPTCY.

(1). *Authority and Liability of Bankrupt Commissioners.*

Trespass.—The defendants, who were commissioners of bankrupts at Leeds, issued their summons to the plaintiff, by which they commanded him to appear at a meeting before them at eleven o'clock on a certain day, and bring with him a certain deed of assignment. He appeared accordingly at eleven o'clock, and afterwards at one. Upon his attending on the second occasion, he saw one of the commissioners, who, on learning that he had not brought the assignment, said, "You must have known it was of no use to come without the assignment, but we will hear what you have to say by and bye." The plaintiff then went away, and two days afterwards was taken into custody by warrant of the commissioners; which, after reciting the proceedings in bankruptcy, and the issuing and service of the summons, "and that the plaintiff

did not come before them in pursuance of the summons in order to be examined touching the matter aforesaid, or produce the said assignment, he having no lawful impediment," &c., directed the constable to apprehend the plaintiff and bring him before the commissioners to be examined as aforesaid, "and to produce the said assignment:"—*Held*, first, that the issuing of the warrant was regular, the plaintiff being bound, not only to attend at the appointed hour, but to wait until he could be examined: secondly, that the warrant was not vitiated by the introduction of the words "to produce the said assignment," inasmuch as a party is compellable to do so, if commanded, under 6 Geo. 4, c. 16, s. 34. *Wright v. Maude*, 527

(2). *Trading.*

A person who keeps a boarding and lodging house, where guests are entertained by the month or week, each having a bed-room to himself, but taking his meals with the proprietor of the house, is a trader within the 6 Geo. 4, c. 16, s. 2, which provides that all "victuallers, keepers of inns, taverns, hotels, or coffee-houses," shall be subject to the bankrupt laws. *Gibson v. King*, 667

(3). *Act of Bankruptcy—Waiver by Assignees of Tort.*

Where a debtor, upon applications made to him by creditors for payment of their debts, made appointments with them to meet him at specified times and places with reference to a settlement of their demands, but failed to keep such appointments:—*Held*, that the failures to keep the appointments constituted acts of bankruptcy, although the places at which the appointments were made were

not his usual places of business. It appeared at the trial, that after the bankruptcy, 85 bundles of yarn, of the value of 114*l.*, had been delivered by the bankrupt to the defendants, as they alleged, to meet an accommodation bill which they were about to give the bankrupt. The goods were accompanied by an invoice, which stated them to be *bought* by the defendants of the bankrupt:—*Held*, under these circumstances, that the assignees might waive the tort, and bring assumpsit for goods sold and delivered. *Russell v. Bell*, 340

(4). *Payment by Bankrupt, when protected.*

A. and B., brothers, being partners in trade, and B. being largely indebted to the partnership, B. borrowed £500 from a loan company, which was secured by a bond of C. (the uncle of A. and B.) and two other persons, and by a policy of assurance on B.'s life. Of this sum B. paid £400 into the partnership funds, B. afterwards executed a warrant of attorney in favour of C., to indemnify him against the consequences of the bond. B. having made default in payment of the premiums on the policy of assurance, the loan company called on C. for payment under this bond; whereupon C. entered up judgment on the warrant of attorney against B., and issued a *fi. fa.* thereon, which was levied on the partnership effects on the 5th August 1840. At that time A. and B. were in a state of hopeless insolvency. On the 7th August, another *fi. fa.*, at the suit of another creditor, was issued against B., and levied on the partnership effects. On the 8th August, A., in the name of the partnership, indorsed and delivered to C., on account of his claim against B., bills of exchange drawn by A. and B. for £81, which were paid at maturity; and on

the 10th, A. paid to C. on the same account, out of the monies of the firm, a further sum of £80 in cash. On the 11th, a docket was struck against A. and B., and on the 12th a fiat issued against them, grounded on an act of bankruptcy committed on the 5th of August, and on the 13th they were duly adjudged bankrupts:—*Held*, that the assignees were entitled to recover from C. the amount of the payments so made to him on the 8th and 10th of August, and that they were not protected by the stat. 2 & 3 Vict. c. 29, not being payments really and *bonâ fide* made within the meaning of that statute, even though C. were assumed to have received them without notice of the bankruptcy. *Semble*, (per *Alderson*, B.), that a mere *payment* by a bankrupt to a creditor, after the act of bankruptcy, is not a contract, dealing, or transaction within the meaning of the 2 & 3 Vict. c. 29, but that the case of such a payment is still governed by the 6 Geo. 4, c. 16, s. 81. *Quære*, whether these were payments made by way of fraudulent preference within that section. *Turquand v. Vanderplank*, 180

(5). *Operation of 6 Geo. 4, c. 16, s. 108, and 2 & 3 Vict. c. 29.*

1. A creditor on a judgment founded upon a warrant of attorney, issued execution thereon, and seized and sold the goods of the debtor under a *fi. facias*, without notice of any act of bankruptcy committed by the debtor. On the day after the sale, a fiat in bankruptcy issued against the debtor:—*Held*, that the assignees were not entitled to recover from the creditor the proceeds of the sale, inasmuch as, at the time of the fiat, he was not a creditor of the bankrupt, within the 6 Geo. 4, c. 16, s. 108. Notice to

a sheriff's officer in possession under a fi. fa., of an act of bankruptcy committed by the defendant, is not notice to the execution creditor, within the 2 & 3 Vict. c. 29. *Semble*, a general notice to the creditor, that the defendant has committed an act of bankruptcy, is sufficient, without stating the nature of it. *Ramsey v. Eaton*, 22

2. In trover by assignees of a bankrupt against the sheriff, the latter justified under a judgment recovered in this Court, a fieri facias issued thereon, and a seizure before the fiat. The plea also stated a sale of the goods, but without averring that it was before the fiat, and alleged that at the time of the seizure, S., the execution creditor, had no notice of any prior act of bankruptcy. The replication stated, that, before the judgment was recovered, the bankrupt made his warrant of attorney, authorizing certain attorneys to appear for him and receive a declaration in debt at the suit of S., and thereupon to confess such action, or else to suffer judgment by nil dicit, or otherwise, to pass against him in such action, to be forthwith entered up against him of record; it then averred that the judgment in the plea mentioned was had and obtained on the said warrant of attorney, and that it was given by way of fraudulent preference. The rejoinder only denied that the warrant of attorney was given by way of fraudulent preference; and the jury found this issue for the defendants:—*Held*, that the plaintiffs were entitled to judgment non obstante veredicto, it being admitted on the record that the judgment was obtained on the warrant of attorney, which would only authorize a judgment by confession, nil dicit, or other default, and therefore that the case was within the 6 Geo. 4, c. 16, s. 108, and the execu-

tion was not protected by the 2 & 3 Vict. c. 29. *Rawdon v. Wentworth*, 36

(6). *Depositions, when Evidence—Evidence of cancellation of Bond.*

Where a bill of exchange for 1600*l.* was deposited with the defendant by a bankrupt, as an indemnity to a third person against a bond which he had executed to the petitioning creditor, under the 1 & 2 Vict., c. 110, s. 8, and the defendant refused to deliver up the bill on the demand of the assignees of the bankrupt, although they shewed him the bond in a cancelled state; and he afterwards obtained 800*l.* on the bill:—*Held*, in trover by the assignees for the bill, that the obtaining money on the bill was an actual conversion of the bill, for which the bankrupt, if no bankruptcy had intervened, might have sued, and therefore that the case was within the 92nd section of the Bankrupt Act, 6 Geo. 4, c. 116, and the depositions under the fiat were conclusive evidence of the bankruptcy. *Held* (by Lord Abinger, C. B.), that the case would have been within that section, even if there had been no evidence of a conversion except the demand and refusal. *Held*, also, that the production of the bond by the assignees to the defendant in a cancelled state was *prima facie* evidence that it was cancelled with the consent of the obligee. *Held* also, that inasmuch as there was a conversion of the whole bill, 1600*l.* was the proper measure of damages, although 800*l.* only remained due on the bill. *Alsager v. Close*, 576

(7). *Certificate no release of Rent due from Bankrupt.*

A landlord distrained the goods of A. on his tenant's premises for rent: the tenant afterwards became bank-

rupt, and obtained his certificate:—*Held*, on error in the Exchequer Chamber, (affirming the judgment of the Court of Exchequer), that the certificate did not operate as a release of the rent, and that the landlord had a right, in replevin at the suit of A., to avow for a return of the goods. *Newton v. Scott*, 471

BEER ACTS.

Liability of Retailer of Beer to Penalties.

Held, on error in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that the keeper of a beer shop, licensed under 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 84, is still liable to the penalties imposed by 53 Geo. 3, c. 58, s. 2, for having in his possession any of the prohibited articles therein specified, or any article or preparation to be used as a substitute for malt or hops. And that in order to render such a person liable to those penalties for having in his possession any of the articles *enumerated* in the 56 Geo. 3, c. 58, s. 2, it is unnecessary to aver or prove, either that the party had them in his possession to be used as a substitute for malt or hops, or that he had them in his possession with any criminal intention. But that where the information is for having in his possession any article not designated by name in that section, it is necessary to shew that it was intended to be used as a substitute for malt and hops in the making of beer. An information on the 56 Geo. 3, c. 58, s. 2, charged that the defendant, being a retailer of beer, received and took into *and had* in his custody and possession a large quantity of liquorice, &c. &c.:—*Held*, that it was not double. *Lockwood v. Attorney-General*, 464

BENEFICE.

See SEQUESTRATION.

BILLS AND NOTES.

Indorsement of overdue Note—Effect of.

The indorsee of an overdue bill or note takes it subject to all the equities arising out of the bill or note transaction itself, but not subject to any collateral claim existing between the earlier parties to it. Therefore, to an action by the indorsee of an overdue note against the payee, a distinct debt due to the payee from a former indorsee cannot be set off. *Whitehead v. Walker*, 696

BOND.

See BANKRUPTCY, (6).

BOROUGH'S BOUNDARY ACT.

By charter of the 18 Edw. 3, the men of the "villa" of Coventry, tenants of the Queen Mother of the manor of Chilesmore, in Coventry, were incorporated. The corporation consisted of the mayor, bailiffs, and men or commonalty of the villa of Coventry. By that and subsequent charters (some of the King, some of Isabel, the Queen of Edward III., and others of the Black Prince), various franchises within the villa of Coventry, and throughout the view of frankpledge of the manor of Chilesmore, and elsewhere, were granted to the mayor and bailiffs of Coventry. By another charter of the 30 Hen. 6, the villa of Coventry, with *Radford*, *Keresley*, and other specified places, were made into a distinct county, called the "county of the city of Coventry." By another charter of the 19 Jac. 1, regulating the government of the corporation, the aldermen of Coventry were made justices of the peace of the county of the city. There

were ten aldermen of Coventry, being one alderman for each of ten wards: and the limits of the wards did not appear far to exceed the continuous lines of streets and houses, popularly known as the city of Coventry:—*Held*, that under the Municipal Corporations' Boundary Act (6 & 7 Will. 4, c. 103, s. 1), places being within the county of the city of Coventry, and through which the mayor and bailiffs of Coventry had a coroner, and other franchises, under the above charters, but being beyond the lines of such streets and houses, and not within any of the wards of Coventry, were not *part of the city of Coventry*. *The Mayor, &c. of the City of Coventry v. Lythall*, 773

CHARTER-PARTY.

(1). *Computation of Lay Days.*

By a charter-party made in London, upon a vessel for a voyage from London to Honduras and back to some port in the United Kingdom, 25 running days for every 100 tons of mahogany were to be allowed for loading the ship at Honduras, and 15 days for discharging at the destined port in the United Kingdom:—*Held*, that in the absence of any custom, Sundays were to be computed in the calculation of the lay days at the port of discharge. The ship arrived at Hull, the port of her destination, on the 1st of February, and was reported; on the 2nd, she entered the dock, and was given in charge of the dock-officer, but did not get to the place of unloading till the 4th, in consequence of the full state of the docks, the officer refusing to take her out of her turn; and the discharge was not completed till the 22nd:—*Held*, that the lay days were to be calculated from the period of her arrival in dock, and not at the place of unloading. *Brown v. Johnson*, 331

(2). *Place of Discharge—Computation of Lay Days.*

By the stipulations of a charter-party, the vessel was to take in a cargo of coal at Newcastle, and proceed therewith to London, or as near thereto as she could safely get, and deliver the same to the freighters or their assigns, &c.: to be delivered in five working days, demurrage over and above the said lying days 2l. per day. The vessel arrived in the port of London, off Gravesend, on the 9th March, and on the 10th the cargo was sold, and the vessel entered by the freighters for a meter. On the 20th she received an order from the harbour-master to proceed to the Pool: on Monday, the 22nd, she commenced working out her cargo, and was cleared on the 27th. It appeared that in consequence of the factor's certificate that she was a metered vessel, the harbour-master had detained her at Gravesend till the 20th, when her turn arrived for her to proceed to the Pool and discharge her cargo; that if she had not been on the meter's list, this regulation would not have applied, and she might have proceeded to the Pool at once; that it was occasionally the practice for factors not to enter such vessels in the meter's list, but that it was desirable that the cargo should be sold, subject to metage by a sworn meter:—*Held*, that under these circumstances the vessel was not to be considered as having arrived at her place of discharge until the 20th, and therefore that the lying days did not begin to count till then. *Kell v. Anderson*, 498

CHURCH.

See PAVING ACT.

CHURCHWARDENS.

Authority of, to prevent Interruption to Divine Service.

A parish clerk having been dis-

missed from his office by the rector, though irregularly, and another appointed, the former entered the church before divine service had commenced, and took possession of the clerk's seat:—*Held*, that the churchwardens were justified in removing him from the clerk's desk, and also out of the church, if they had reasonable grounds for believing that he would offer interruption during the celebration of divine service. *Burton v. Henson*,

105

COGNOVIT.

Attestation.

Where a cognovit, executed since the passing of 1 & 2 Vict. c. 110, was attested as follows—"Witnessed by me, W. P., as the attorney of the said A. B., attending at the execution hereof at his request, and expressly named by him:"—*Held*, that it was insufficient. The attestation ought to contain words which shew with certainty that the subscribing witness is the attorney of the party executing it, and that he attests or subscribes the execution as such attorney. *Hibbert v. Barton*,

678

COIN.

Declaration of Value on shipment of abroad.

On a shipment of a cargo from Valparaiso to England, the bill of lading described the property as "1338 hard dollars," which was a coin current at Valparaiso at the time:—*Held*, that this was a sufficient compliance with the provisions of the stat. 26 Geo. 3, c. 86, s. 3, it being the current coin of the place where the shipment was made. *Quære*, whether that statute is at all applicable to the case of shipments made in places not subject to the British laws. *Gibbs v. Potter*,

70

CONSTABLE.

COMMITMENT.

When bad for Variance from Conviction.

Upon a complaint against a servant for absenting himself from his service, made under the 4 Geo. 4, c. 34, s. 3, the conviction adjudged that he should be imprisoned in the house of correction, there to remain and be held to hard labour for one month. The commitment required the keeper to receive him into custody, there to remain and *be corrected*, and held to hard labour for one month (following the words of the 20 Geo. 2, c. 19, s. 2):—*Held*, that the "correction" therein mentioned must be understood to mean something beyond the hard labour, and therefore that the commitment was bad, as varying in this respect from the conviction, and authorizing a punishment not warranted by the statute. *Wood v. Fenwick*,

195

CONSTABLE.

Notice of Action to.

A local act of Parliament, for lighting, watching, &c., the town of Staley-bridge, empowered the commissioners therein named to appoint constables and assistant constables for keeping the peace in the said town, and for executing all such warrants, &c., as the justices of Cheshire or Lancashire should direct to them to be executed within the town. Another section enacted, that no plaintiff should recover in any action against any person for anything done in pursuance of the act, without twenty-one days' notice of action having been given:—*Held*, that a constable appointed under the act, who was sued in trespass for breaking and entering the plaintiff's house in the town of Staley-bridge, in the execution of a warrant granted by

a justice of Cheshire, to search for goods alleged to have been clandestinely removed there to avoid a distress, under the 11 Geo. 2, c. 19, s. 7, was not entitled to notice of action. *Shatwell v. Hall*, 523

CORONER'S INQUISITION.

Several Deodands.

By a coroner's inquisition, it was found that the death of the individual named therein was caused by a steam-engine with a train of carriages running off the railway; that the said steam-engine was then of the value of 125*l.*, and was then the property and in the possession of the Eastern Counties Railway Company. There were three other inquisitions on three other persons, in precisely the same form, and imposing a deodand of the same amount. The deodands having been estreated into the Exchequer, under 3 & 4 Will. 4, c. 99, the Court refused on motion to stay proceedings on three of the inquisitions, on payment of 125*l.* on one of the inquisitions, on the ground that the instrument moving to the death of the party could not be twice forfeited for the same accident, but left the parties to their remedy by traversing or setting aside the inquisitions. *Regina v. The Eastern Counties Railway Company*, 58

COSTS.

See INTERPLEADER ACT.
PAUPER.

(1). *Of Trial.*

On the trial of a cause in which there were several issues, the plaintiff had a general verdict, leave being reserved to the defendants to move to enter a nonsuit, or a verdict for the defendants. A rule was obtained accordingly, and thereupon it was agreed,

at the suggestion of the Court, that the facts should be stated in a special case for the opinion of the Court. On the argument of the case, the Court gave judgment for the defendants, and the verdict was accordingly entered for them, and this judgment was afterwards affirmed on error in the Exchequer Chamber:—*Held*, that the defendants were entitled to the costs of the trial; and that, although one of the issues was given up by them at the trial. *Tobin v. Crawford*, 602

(2). *Scale of Taxation of.*

An action having been brought against the sheriff to recover a less sum than 20*l.*, the plaintiff applied to a Judge to have the cause heard before the coroner, under the 3 & 4 Will. 4, c. 42, s. 17, which the defendant opposed, on the ground that the coroner was not the person before whom the act empowered the Court to order a case to be tried; and the Judge refused the order on that ground. Proposals were then made to try the cause before the Judge of the Palace Court, or to change the venue; both of which were objected to by the defendant. The defendant then obtained leave to withdraw his plea and suffer judgment by default, and an order was accordingly made, which made no mention of the costs:—*Held*, that the plaintiff's costs must be taxed on the lower scale prescribed by the rule of H. T., 4 Will. 4, and that if he wanted to tax on the higher scale, he ought to have applied to the Judge, on the summons to allow the defendant to withdraw his plea, to make it a condition that they should be so taxed. *Levy v. Magnay*, 664

COVENANT.

When collateral.

By indenture made between A., B.,
G G G 2

and C. of the first, second, and third parts respectively, the plaintiff of the fourth, and the defendant of the fifth part, the defendant covenanted with the plaintiff that he the defendant, A., B., and C., or one of them, would pay the plaintiff 300*l.*:—*Held*, that this was a collateral covenant, and that an action for the recovery of the money must be framed in covenant, and not in debt. *Harrison v. Matthews*, 768

COVENANT TO REPAIR.

See LANDLORD AND TENANT, (2).

CUSTOM.

See MANOR.

DEODAND.

See CORONER'S INQUISITION.

DETINUE.

Plea of Lien in.

In an action of detinue for certain goods, to wit, 1000 yards of broad cloth and two pieces of other cloth, the defendant by his plea claimed a lien for fulling the cloths mentioned in the declaration; and it appeared at the trial that originally eight pieces of cloth had been delivered at the same time to the defendant to be fulled, and that six out of the eight pieces had afterwards been re-delivered:—*Held*, that the plea only extended to the two pieces actually detained, and that the defendant could not under that plea set up a claim of lien for fulling more than two pieces, but should have asserted specifically his claim in respect of the eight. *Coombs v. Noad*, 127

DISTRESS.

See BANKRUPTCY, (4).

DRAINAGE ACT.

DOG-MATCH.

See GAMING, (1).

DRAINAGE ACT.

By an act of the 4 & 5 Vict. c. cxiii, trustees were appointed for the purpose of the more effectual drainage, by means of a steam-engine, of a fen district in Lincolnshire, called the Bourn North Fen and the Dyke Fen; and by the 62nd section, it was enacted that every engine, machine, building, and work, to be erected and made by the trustees under the powers of the act, and all engines, machinery, buildings, &c., sewers, *drains*, *watercourses*, &c. &c., and other works *already made, or then existing or provided* for the drainage of the Bourn North Fen and Dyke Fen, and which should be thereafter made and provided for such purpose, and the right to and property in them, should be and they were thereby vested in the trustees: with a proviso, that nothing in the act contained should extend to or affect any engines, machinery, &c., sewers, drains, watercourses, &c., and other works already made, or then existing or provided for the drainage of the said fens, and then vested in and under the control of certain commissioners, appointed under a former inclosure and drainage act, called the Black Sluice Commissioners. And sect. 64 enacted, that it should be lawful for the trustees, upon any land in Bourn North Fen and Dyke Fen, *not vested in the Black Sluice Commissioners*, to make and erect a steam-engine, with all proper machinery, with proper and convenient buildings, *sluices*, pits, and other necessary works; and to make and from time to time maintain, repair, and improve, as occasion might require, the sluices, bridges, cuts, sewers, and other works, already or thereafter to be made in, upon, and through the said fens, for

effectually draining the same, out of the funds to be raised under the authority of the act, and making compensation for damage:—*Held*, that the trustees had no power, under this act, to widen a drain under the control of the Black Sluice Commissioners, from the width of eighteen to forty feet, for the purpose of a reservoir, to bring a sufficient supply of water to their steam-engine, thereby cutting away upwards of three acres of the land vested in the commissioners, although such widening was itself an improvement of the drainage; and that they had no power to make any reservoir on the land vested in the commissioners, although the making of a reservoir was necessary to the proper working of the engine for the purpose of the drainage, and none could be made without cutting into some of the banks or drains vested in the commissioners. *Smith v. Bell*, 378

EJECTMENT.

(1). *Service in.*

In ejectment for part of the bed of a canal, service of the declaration on the clerk of the canal company at their office, was held sufficient for a rule nisi for judgment against the casual ejector. *Doe d. Fisher v. Roe*, 21

(2). *Proceeding under 1 Geo. 4, c. 87.*

Where a person held premises under an agreement in writing, from quarter to quarter, and the agreement provided that the tenant should quit possession upon receiving six months' notice in writing, and in the event of his losing his license to sell ale, &c., through misconduct at any time during the term, should then forthwith quit possession, on being requested so to do by his landlord:—*Held*, that he had neither a tenancy from year to year,

nor a term certain in the premises, within 1 Geo. 4, c. 87, s. 1, so as to entitle the landlord in ejectment to compel him to give security for costs under that act. *Doe d. Carter v. Roe*, 670

(3). *Costs in.*

After a rule for judgment in ejectment against the casual ejector, the defendant delivered a plea and consent rule, in the latter of which the lessor of the plaintiff never joined, and judgment of non pros. was afterwards signed:—*Held*, that the Court had no power, either under the rule of H. T., 4 Vict., or otherwise, to compel the lessor of the plaintiff to pay those costs, or join in the consent rule. *Doe d. Pratten v. Board*, 675

ESTATE TAIL.

Remitter to—*Issue in tail, when barred by Statute of Limitations.*

By marriage settlement, purporting to be made in pursuance of articles recited in it, an estate was conveyed to the husband and wife, and the heirs of their bodies:—*Held*, that they thereby became tenants in tail special, and that a court of law could not construe the deed as making them tenants for life, with remainder to their issue in tail, even supposing that such be the construction to be put upon the articles by a court of equity. An estate being limited by marriage settlement to the use of A. and his wife, and the heirs of their bodies, and A. having died, leaving his widow and three children, viz. G. an only son and L. and H. daughters, the widow, in 1735, by deed poll, in consideration of an annuity granted to her by her son, and of natural affection, "granted, surrendered, and yielded up" the estate in question to the son in fee; and he afterwards,

during her life, suffered a recovery. The widow died in 1767; G. died without issue in 1779, having devised the estate to trustees to secure the payment of an annuity to W., the only son of his sister L. (who was then dead), and subject thereto to B., the eldest son of W., for his life, with remainder to the defendant, his second son. In 1790, B. entered, on his father's death, into possession of the entirety of the estate, claiming under the will of G., and subsequently did various acts in the character of devisee for life; in 1814 he suffered a recovery of one moiety, and in 1816 conveyed the entirety of the estate to mortgagees in fee. In 1818, M., the descendant of the other co-parcener, H., at the request of B. suffered a recovery of a moiety, which it was declared should enure (subject to a term to secure a sum of money to M.) to the use of B.'s mortgagees:—*Held*, first, that the deed poll of 1735 operated as a covenant to stand seised, and created a base fee, determinable by the entry of the issue in tail: secondly, that although G., being estopped by the recovery suffered by him, was not remitted to the estate tail, yet, for the same reason, no right of entry accrued until his death, and therefore the period of twenty years, for the operation of the statute of limitations against the issue in tail, was to be calculated from his death in 1779, and not from the death of his mother in 1767; consequently, that the entry of B. (in 1790) was not barred by lapse of time: thirdly, that although B. entered under the will, and indicated an intention to take the estate under it for his life only, this intention was immaterial, and he was remitted, nolens volens, as to his moiety, to the original estate tail, which was barred by the recovery of 1814: and fourthly, that either his possession enured to the benefit of his co-parcener

M., so as to render the recovery of 1818 effectual as to the other moiety, or operated to confer on him, B., an estate in fee by wrong, which, being conveyed to the mortgagees in 1816, gave them a good title against the defendant, who claimed as devisee under the will of G. *Doe d. Daniell v. Woodroffe*, 608

EVIDENCE.

See FERRY.

GAMING, (1).
MANOR.

(1). *Secondary Evidence*—*Notice to produce*.

An action on a bond of indemnity stood for trial at the Flintshire assizes: the commission day was on the 27th July; the cause was tried on the 29th. At 10 a. m. on the 28th, a notice to produce the bond was served on the defendant's attorney in the action (who resided in London) in the defendant's presence, in the assize town. The bond was in the possession of one W., who held it as the representative of a former attorney of the obligors, and was himself the defendant's general attorney, and who had undertaken to produce it at the trial, if the judge should think he was bound to do so. Before the assizes, the bond had been sent by W. to the defendant's attorney in the action, in London, for the purposes of inspection and admission under a judge's order; and the plaintiff's attorney had there taken a correct copy of it. At the trial, W. had the bond in Court, but objected to produce it on the ground of privilege, and the objection was allowed:—*Held*, first, that the notice to produce the deed was sufficient, under the circumstances, to let in secondary evidence of it; secondly, that the copy so taken by the plaintiff's attorney was admis-

sible as such evidence. *Lloyd v. Mostyn*, 478

(2). *Declaration by deceased Collector of Rents.*

Quære, whether a *verbal* statement, made by a deceased collector of rents, at the time of paying over to his employer monies received by him from the tenants, as to the person from whom he received a particular sum entered by him in the rental, is admissible in evidence against that person. *Fursdon v. Clogg*, 572

EXTENT.

The sheriff having returned to an extent that he had seized money into the hands of the Queen, and it appearing that the money was in the hands of the Accountant-general in bankruptcy, the Court made an order absolute for the sheriff to pay over the money, but refused to make the Accountant-general in Bankruptcy a party to the order. The sheriff having applied to the Court of Review for an order for the Accountant-general in bankruptcy to pay over the money to him, the order was refused, on the ground that the sheriff had no *locus standi* in that Court. This Court afterwards discharged the common order on the sheriff. *Regina v. Austin*, 691

FALSE REPRESENTATION.

Action for, when maintainable.

A collateral statement, made at the time of entering into a contract, but not embodied in it, must, in order to invalidate the contract on the ground of its being a fraudulent statement, be shewn not only to have been false, but to have been known to be so by the party making it, and that the other party was thereby induced to enter into the contract. (Per *Parke*, B., and *Alderson*, B.; Lord *Abinger*,

C.B., dissentiente). A cargo of coffee was sold by a broker, for H., P., & Co. of Liverpool; and the words "invoiced to the sellers as of first shipping quality," were introduced into the bought and sold notes. At the same time the invoice was shewn to the buyers, which stated the cargo to be shipped by H., Brothers, & Co., consigned to H., P., & Co., for sale on account and risk of whom it may concern—3150 bags "first shipping quality." H., Brothers, & Co. were a branch house at Rio de Janeiro, composed of the same partners as the firm of H., P., & Co.:—*Held*, in an action on the case against H., P., & Co. for deceit, that it was a proper question for the jury, whether the invoice imported that the coffee was invoiced to the defendants by distinct parties as the sellers thereof. *Quære*, whether the action ought not to have been brought upon the contract, instead of in tort. *Moens v. Heyworth*, 147

FERRY.

Duty of Ferryman to land Goods—Evidence.

Declaration in case against the owners of a ferry stated, that the defendants were possessed of a ferry across the river Mersey, from Woodside to Liverpool, and that the plaintiffs delivered to them certain goods, to wit, a phaeton, and certain jewellery and watches contained in it, to be by the defendants, for reward to them in that behalf, taken care of and carried in a certain steam-boat from Woodside to Liverpool, and there landed for the plaintiffs; that the defendants accepted and received the said carriage so containing the said jewellery and watches from the plaintiffs, and it became their duty to take proper care of them while they remained in their custody, and in and about the carriage, conveyance, and

landing of the same as aforesaid. Breach, that the defendants took such bad care of the said carriage, jewellery, and watches, and so negligently conducted themselves in and about the carriage, conveyance, and *landing* of the same, that they were injured. Plea, that the plaintiffs did not deliver to the defendants, nor did they accept and receive from the plaintiffs, the goods in the declaration mentioned, to be by them carried and conveyed in the said steam-boat from Woodside to Liverpool, and *there landed* for the plaintiffs, for reward to them in that behalf, modo et formâ:—*Held*, that a contract to carry *and land* the carriage and jewellery, as stated in the declaration, could not be implied from the mere character of the defendants as owners of the ferry. But that it was a question for the jury, whether there was in fact a contract between the parties, either express or implied from usage, to receive the carriage on board, and to land it again at the end of the transit across the river. It appeared that the plaintiff went on board the defendant's steam-boat, with his horse and carriage, paying the defendants' charge for a "light four-wheeled phaeton;" that jewellery and watches of great value, which much increased its weight, were contained in a box under the seat; and that he made no communication of that fact to the defendants. The carriage was taken safely across the river, and on the arrival of the boat at the pier head at Liverpool, two of the defendants' servants put the carriage out upon the slip, and commenced drawing it up the slip towards the quay, but in doing so were overpowered by its weight, and it ran down into the river, whereby the jewellery and watches were injured:—*Held*, that the plaintiff's right of action for this injury was not affected by his not having communicated the

fact of the jewellery and watches being contained in the carriage:—*Held* also, that it was a further question for the jury (supposing a contract to land were established) whether the landing was complete under the above circumstances:—*Held*, also, that to rebut evidence of a usage to take on board and land the carriages of passengers, a notice stuck up at the door of entrance for foot passengers to the slip at Woodside, but not visible to those who came with carriages, nor shewn to have been known to the plaintiff,—that the defendants did not undertake to load or discharge horses or carriages, and would not be responsible for loss or damage thereto,—was not admissible. *Walker v. Jackson*, 161

FRAUDS, STATUTE OF.

See PLEADING, III. (3).

GAMING.

(1). *Illegality of Coursing Matches—Construction of Agreement—Evidence.*

A coursing match is a game within the meaning of the 9 Anne, c. 14, s. 3, and an agreement to run such a match for more than £10, or to forfeit the same amount in default of running it, is an illegal agreement, and an action for the penalty for not running the match cannot be sustained. The objection, that the match was illegal under the 16 Car. 2, c. 7, s. 2, cannot be taken unless pleaded specially, although the objection appears on the plaintiff's case. The plaintiff and defendant made an agreement in writing to run a match with greyhounds "on the Wednesday during the Newmarket February meeting, 1841." It appeared that the Newmarket meetings were meetings of a coursing club; that the power of appointing and adjourning meetings was vested in the stewards, who were governed by printed rules;

and that the practice of the club was to hold the February meeting on the first Tuesday in that month, weather permitting; but if the weather prevented its being then held, to adjourn it to a future day, weather permitting. At the time when the contract was made, the day appointed for the February meeting was Tuesday, the 2nd February, 1841. On Wednesday, the 3rd, the plaintiff and defendant were there, but frost prevented the meeting from being then held, and it was adjourned to Tuesday the 9th, and again, from the same cause, to Tuesday the 16th, when it was held. On Wednesday, the 17th, the plaintiff was ready with his dog to run the match, but the defendant made default:—*Held*, first, that the true construction of the contract was, that the match should be run on the Wednesday during the February meeting, whenever it should be actually held, and therefore that the plaintiff performed his part of the contract by being ready to run on Wednesday the 17th: secondly, that the plaintiff was not bound to produce the printed rules, but it was enough for him to shew that the February meeting was then actually held. *Held*, also, that evidence was admissible to shew the meaning of the words “P. P.” subjoined to the agreement. *Daintree v. Hutchinson*, 85

(2). *Horse-race, when legal.*

Since the repeal of the stat. 13 Geo. 2, c. 19, a horse-race for money given by third persons, by way of prize, is not illegal. The stat. 16 Car. 2, c. 9, does not prohibit all gaming, but only such as is *fraudulent* or *excessive*. A horse-race for a sweepstakes of £2 each is not within the 2nd section of the 9 Anne, c. 14, nor, as it seems, within the 5th section; there not being any loser to the amount of £10. *Semble*, that, by the stat. 9 Anne,

c. 14, not only the *security* given for a gaming debt, but the *contract* itself, was avoided; but at all events this must be taken to be the case since the stat. 5 & 6 Will. 4, c. 41. *Applegarth v. Colley*, 723

HIGHWAY ACT.

(1). *Liability of Surveyor.*

The defendants, who were magistrates, directed the plaintiff, a surveyor of highways, to remove a certain nuisance from the highway, and to fence a pit that was dangerous, and, on his neglecting to do so, convicted him in a penalty for having “wilfully neglected his duty in not removing, or causing to be removed, certain nuisances in and upon a certain highway in the said parish, &c., and not duly guarding a dangerous pit lying on the said highway:—*Held*, that the conviction was not warranted by the 20th or 73rd section of the Highway Act, 5 & 6 Will. 4, c. 50, and that it could not be supported. *Morgan v. Leach*, 558

(2). *Construction of Local Improvement Act.*

By a local act for the improvement of the town of Bedford, (43 Geo. 3, c. cxxviii), the commissioners therein mentioned were invested (by s. 37) with all the powers, provisions, and authorities, and were to be in the receipt and possession of all compositions, rates, &c., granted by the 13 Geo. 3, c. 78, and the surveyors to be appointed by the commissioners were to have the same powers of demanding, collecting, and recovering payment of such compositions &c. as under that act. By s. 39, the then surveyors of the highways within the ambit of the act were, on a day to be appointed by the commissioners, to produce to them their accounts, and pay over all balances in their hands to the treasurer of the commissioners,

and thenceforward their office was to be determined. By s. 50, the commissioners were empowered, in order to raise money for carrying the purposes of the act into execution, to lay one or more rates once in every year, or oftener if necessary, on all houses, shops, &c. within the town, so as such rates should not exceed 8d. in the pound in a year on their yearly value. By a subsequent act, 50 Geo. 3, c. lxxxii, reciting that the commissioners had borrowed considerable sums of money on the rates, and that they were inadequate to the purposes of the act, the power of rating houses, shops, &c. was extended from 8d. to 1s. in the pound in the year:—*Held*, that the commissioners had no power, in case the rates so levied proved insufficient for the purpose of the act, to levy a subsidiary rate by application to be made to the justices by the surveyor, under the 13 Geo. 3, c. 78, s. 45. *Higgins v. Green*, 703

HORSE RACE.

See GAMING, (2).

HUSBAND AND WIFE.

Liability of Widow for Goods supplied after her Husband's Death abroad.

Where a man who had been in the habit of dealing with the plaintiff for meat supplied to his house, went abroad, leaving his wife and family resident in this country, and died abroad:—*Held*, that the wife was not liable for goods supplied to her after his death, but before information of his death had been received; she having had originally full authority to contract, and done no wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge relating to it; the revocation itself being by the act of God, and the continuance of the

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life of the principal being equally within the knowledge of both parties. *Smout v. Ilbery*, 1

INFANT.

What Contract binding on.

Semble, a contract of hiring and service, for wages, is a contract beneficial to and binding upon an infant, though it contain clauses for referring disputes to arbitration, and for the imposition of forfeitures in case of neglect of duty, to be deducted from the wages. *Wood v. Fenwick*, 195

INFORMATION OF INTRUSION.

Pleadings in.

An information of intrusion stated, that the defendants intruded and made entry on a certain messuage or dwelling-house, situate &c., and being parcel of the royal palace of Kensington, then in the occupation of our lady the Queen, and which was in the hands and possession of the Queen in right of her Crown. The defendants pleaded, in the form given by the stat. 23 Hen. 8, c. 5, s. 8, that they committed the trespasses under the authority of a commission of sewers, for tax assessed by the said commission:—*Held*, on demurrer, that this form of plea was not allowable in an information of intrusion at the suit of the Crown. *Attorney-General v. Donaldson*, 117

INSOLVENT.

(1). *Title of Assignee.*

The assignee of an insolvent debtor, on his acceptance of the appointment, has vested in him all the estate of the insolvent from the date of the vesting order. And in trover by such assignee, for a conversion of part of the insol-

INTERPLEADER ACT.

vent's estate before his appointment, and in the time of the provisional assignee, a copy of the adjudication of the prisoner's discharge, certified pursuant to the stat. 1 & 2 Vict. c. 110, s. 105, shewing the date of the vesting order, is good evidence of the plaintiff's title. But the order of appointment of the assignee is not evidence of the time from which his title accrues, but only of the appointment itself. *Yorke v. Brown*, 78

(2). *Plea of Discharge of.*

A plea of the plaintiff's discharge under the Insolvent Debtors' Act, ought to aver that the vesting order was made before the commencement of the suit. But such a plea need not allege that the petition was not dismissed, or that the vesting order is still in force, nor that the petition was filed, and the vesting order made, after the stat. 1 & 2 Vict. c. 110, came into operation. *Tucker v. Webster*, 371

INTERPLEADER ACT.

Jurisdiction as to Costs.

1. The assignees of a bankrupt, to whom certain goods were consigned, having set up a claim to the goods in the hands of the defendants, the carriers, the defendants applied to a judge under the first section of the Interpleader Act, and obtained an order, that unless cause were shewn to the contrary on a day named, the assignees should be barred their claim, and pay the defendants' costs. The assignees attended on the day named, and objected to the payment of the costs by them; and the order was discharged. Several summonses were subsequently served, calling on the plaintiffs (the vendors) and the assignees to state the nature and particulars of their respective claims. The assignees did not attend on any of these sum-

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monses:—*Held*, that the Judge had no jurisdiction under the act to order the assignees to pay costs. *Grazebrook v. Pickford*, 279

2. A judge's order imposing costs in the matter of an interpleader order heard at chambers, may be reviewed by the Court. *Teggin v. Langford*, 556

JOINT-STOCK COMPANY.

(1). *Right of Shareholder to have Shares registered—Proof of Title to Shares.*

Case against the secretary of the Anti-Dry-Rot Company, for not making out and delivering to the plaintiff a certificate in respect of each of 20 shares purchased by him. The act 6 Will. 4, c. xxvi, provides that the capital shall be 250,000*l.*, and that the number of shares shall be limited to 10,000; and the 16th section enacts, that the company shall keep a book, and cause to be entered therein the name and designation of every person subscribing for shares in the undertaking, and of every person entitled to any shares therein, making a separate entry of each share in numerical order; and that after the making of such entry a certificate shall be made out in respect of every share, specifying the number of such share, and the name of the proprietor thereof, and such certificate shall be delivered to the proprietor upon demand. And the twentieth section provides that it shall be lawful for the proprietor of every share to sell and transfer the same by writing duly stamped, which transfer shall be exhibited to the company, or their secretary, to be filed and registered in the manner prescribed by the act. At the trial, the plaintiff produced in evidence twenty scrip certificates payable to bearer, signed by three of the directors, and countersigned by one T., who had

been secretary to the company. It appeared that T. had fraudulently re-issued a number of the shares, and this having become known, the shares, at the time the plaintiff purchased, were at a low discount. Notices had been given by the company in the public papers of the fraud which had been practised, and the broker who negotiated sale of the shares to the plaintiff knew of that fraud at the time. It appeared that at the time the scrip certificates were brought by the plaintiff to be registered, the whole number of 10,000 shares had been already entered in the register, pursuant to the act. It was thereupon objected that the register being full, and the defendants having no power to add to the number of shares, the action in this form would not lie; and the learned Judge being of that opinion, nonsuited the plaintiff:—*Held*, that the nonsuit could not be supported; because the register might have been improperly filled, in which case the company would be taking advantage of their own wrong. *Semble*, that it was not sufficient for the plaintiff merely to produce scrip certificates payable to bearer, which he had required to be registered, but that he ought to have shewn his *title* to have those shares registered, and to have deduced a good title from the original subscriber and his assignees. It was also objected at the trial, that the plaintiff was not the *bonâ fide* holder of these shares, inasmuch as he had purchased them after notice that many shares were fabricated by a person who was himself a director and secretary of the company for a time, and that it might be that the plaintiff had acquired his title through some of those false certificates; and it was proved that the plaintiff had given a less price than the ordinary one; but *semble*, that that would not deprive him of the title he had by the

transfer, unless it were shewn that he was *not* the *bonâ fide* owner. *Daly v. Thompson*, 309

(2). *Execution against Member of—Scire Facias.*

The stat. 4 & 5 Vict., c. lxxxix, enables the "Patent Rolling and Compressing Iron Company" to sue and be sued in the name of their secretary; and enacts, that every judgment, &c., shall and may be lawfully executed against, and have the like effect upon, the person and estate of every individual shareholder, as if he had been by name a party to the proceedings: provided, that no execution against any person being or having ceased to be a shareholder shall be issued without leave first granted by the Court in which the judgment, &c. shall have been obtained, upon a motion in open Court, and after notice of such motion given to the person to be charged:—*Held*, that such execution could not be issued against an individual shareholder merely on motion, but that there must also be a previous *scire facias*. *Held*, also, that such execution might be had upon a judgment in an action brought against the secretary, for work done for the Company, on his order, before the passing of the act. *Cloves v. Brettell*, 506

JOINT-STOCK BANKING COMPANY.

Action not maintainable except against Public Officer—Pleadings.

The creditor of a banking copartnership, established and carrying on business under the stat. 7 Geo. 4, c. 46, cannot sue an individual member of the company for his debt, but must proceed against the public officer, pursuant to the 9th section of that act:—at least, where it appears that there is a public officer, and that he is within

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the jurisdiction. Therefore, a plea to an action against an individual member of the company, which stated that the causes of action accrued against a certain banking copartnership established under the 7 Geo. 4, c. 46, and not otherwise, of which copartnership the defendant was a member; that the causes of action accrued against the defendant as such member and not otherwise; that S. B. and W. D. had been duly appointed and registered pursuant to the statute, as public officers of the copartnership, to sue and be sued on behalf of the same, and that the said person, so being and being duly nominated and appointed and registered as such public officers, at the time of the commencement of the suit, were living, and resident in England and within the jurisdiction of the Court,—was held a good answer to the action. Such a plea is properly pleaded in bar, and not in abatement. *Held*, also, that the plea was not bad as amounting to an argumentative denial of the contract, for that it admitted that the defendant contracted, but avoided the effect of that admission by the statutable exemption from an action in his favour:—that the plea need not state that the public officers were nominated while the company carried on the business of banking, by issuing notes, &c.; or that the causes of action did not arise against the defendant in his character as a banker. *Held*, also, that the plea, taking it altogether, sufficiently alleged that the two persons therein mentioned actually *were* public officers of the company. *Steward v. Greaves*, 711

JURY.

See SPECIAL JURY.
WRIT OF TRIAL.

(1). Challenge—how made.

A challenge to the array or to the

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polls ought to be propounded in such a way at the trial as that it may be then put upon the *nisi prius* record, so that the other party may either demur or counterplead, or deny the matter of challenge; and unless the challenges are so put on the record, the party is not in a condition as a matter of right to insist upon them. Although the Court would probably in some cases, where a valid challenge has been made and overruled at *nisi prius*, but omitted to be put upon the record, grant a new trial, they will not do so where the party must have been aware of the ground of challenge before the trial, and might by moving to change the venue have obviated the objection. *Mayor &c. of Carmarthen v. Evans*, 274

(2). What treating of avoids Verdict.

Where two of the jury, during the progress of a trial which lasted two days, dined and slept at the house of the defendant on the evening of the first day, and consequently before the summing up:—*Held*, that this did not avoid a verdict found for the defendant. *Held*, also, that it was discretionary with the Court whether they would set aside the verdict and grant a new trial in such a case; and where the party making the application declared that he did not entertain any belief that the jurors, in giving their verdict, were influenced by their visit, and there were no grounds for suspicion of unfairness, the Court refused to set aside the verdict. *Morris, Bart. v. Vivian*, 137

LANDLORD AND TENANT.

(1). Tenancy from Year to Year, Evidence of.

In debt for rent, stating a demise of a messuage &c. by the plaintiff to

W. H., for one year, and so on from year to year if they should respectively please, at the yearly rent of 140*l.*, payable quarterly, and an assignment by W. H. to the defendant, the plaintiff proved an agreement (signed by himself only) for a lease of the premises by him to W. H. for seven years, at 140*l.* a year, that no lease had been actually executed, but that W. H. had entered into possession shortly after the date of the agreement, and had paid two quarters' rent, at the rate of 140*l.* a year:—*Held*, that this was sufficient evidence of a tenancy from year to year, as stated in the declaration, and in which W. H. had an assignable interest. *Braythwaite v. Hitchcock*, 94

(2). *Underlessee, when liable for Costs of Action against Lessee for Non-repair.*

A message and premises were demised to the plaintiff by a lease bearing date the 10th of May 1828, for the term of twenty-one years from the 25th of March then last; which lease contained covenants to paint the outside of the premises once in every three years, and the inside once in every seven years, and to repair and keep in repair the premises, and also to do any repairs which on a view of the premises by the lessor should be found wanting, of which notice should be given. By a lease dated the 15th of June 1830, the plaintiff demised the premises to the defendant for the residue of the term, wanting ten days, containing covenants, with the exception of a stipulation as to painting the outside wood-work, in precisely the same terms as those contained in the original lease. The original lessors having brought an action against the plaintiff for breaches of the covenant to repair, he applied to the defendant to perform the repairs, and for instructions as to the course he should

pursue with respect to the defence of the action. The defendant denied that any notice to repair had been given, and insisted that the premises did not require it; the plaintiff thereupon offered to suffer judgment by default, which the defendant refused to assent to. The plaintiff then gave the defendant notice, that as he had denied that any notice to repair had been served, and insisted that the premises were not out of repair, he should traverse the breaches of covenant assigned, and try the question, holding the defendant responsible for the costs. This he accordingly did, and the result was, that the original lessors recovered £68 damages, and 58*l.* 12*s.* for costs, and he himself incurred costs amounting to 53*l.* 14*s.* 4*d.*:—*Held*, that the plaintiff was not entitled to recover from the defendant the costs of defending the action, as they were not necessarily occasioned by the defendant's breach of the covenant to repair. *Held*, also, that although the covenants contained in the sub-lease were (with the exception of that relating to painting) the same in words as those contained in the original lease, they were, in effect, substantially different, the periods at which the leases were granted being different. *Semble*, that the plaintiff ought to have paid the amount of the dilapidations into Court, instead of defending the action. *Walker v. Hatton*, 249

(3). *Implied Obligation to repair.*

Where the tenant of a house undertakes by his agreement to keep it in as good repair as when he took it, fair wear and tear excepted, he is not entitled to quit upon its becoming uninhabitable for want of other repairs during the term; and the landlord is under no implied obligation to do any repairs in such a case. *Arden v. Pullen*, 321

(4). *Distress.**Sale by Landlord under.*

Quære, whether a landlord, who has seized his tenant's hay and straw under a distress for rent, may sell it, subject to a condition that the purchaser shall consume it on the premises, according to the custom of the country. *Frusher v. Lee*, 709

LIBEL.

Actionable Words.

The defendant published a placard stating of the plaintiff, who was an overseer of the poor, "that when out of office he had advocated low rates, and when in office had advocated high rates, and that he (the defendant) would not trust him with 5*l.* of his property."—*Held*, that these words were actionable per se, without any innuendo. *Cheese v. Scales*, 488

LIEN.

See DETINUE.

LIGHTING AND WATCHING ACT.

Under the general Lighting and Watching Act, 3 & 4 Will. 4, c. 90, a majority of two-thirds of the rate-payers of a parish is required only at the original meeting to be held under the 9th section, for determining as to the adoption of the act, and as to the amount which the inspectors shall have power to call for in any year: but where the parish has adopted the provisions of the act, a majority of two-thirds is not necessary, in order to determine the amount to be raised for the purpose of the act in a subsequent year, under s. 18; but the resolution of a simple majority of the rate-payers voting at the meeting called for that purpose, or, in case of

a poll being demanded, of the rate-payers voting upon it, is sufficient. *Beechey v. Quentery*, 65

LIMITATIONS, STATUTE OF.

See ESTATE TAIL.

PLEADING, III. (2).

PROCESS, (2).

Construction of a document given in evidence as an acknowledgment of title under the stat. 3 & 4 Will. 4, c. 27, s. 17. *Fursdon v. Clogg*, 572

MANOR.

Custom—Evidence.

On a question as to the existence of a custom in a particular manor, evidence of a like custom in an adjoining manor, though within the same parish and leet, is not admissible. Not even though there be evidence to shew that the latter manor was a subinfeudation of the former; at least, unless it be clearly shewn that they were separated after the time of legal memory, since otherwise they may have had different immemorial customs. Evidence of payment of an annual sum of 4*s.* by the lord of the manor of W. to the lord of the manor of C. "for the manor of W.," was held not to be sufficient evidence that W. was such a subinfeudation of C. A deed dated in 1605, made between the lord of the manor of C. of the one part, and a number of the copyholders of the manor of the other, reciting that the customs of the manor, of and concerning their copyhold premises, had immemorially been claimed to be as thereafter expressed, proceeded to state in detail various alleged customs, among which no mention was made of any custom for the copyholders to take minerals. The deed then stated, that whereas, at the request of the said copyholders, and in consideration of £1500 paid by them to the lord, he had agreed that the

said customs should be allowed, ratified, and confirmed, and that the copyholders were contented to submit to them: therefore the lord did thereby, for him and his heirs, allow all the said customs to be the true customs of the manor, for and touching all the said customary and copyhold lands before mentioned; and the lord then covenanted with the said copyholders that he, his heirs and assigns, should be bound by the said customs for ever, and that the copyholders, their heirs and assigns, should enjoy them for ever without interruption; and the copyholders covenanted with him that they would at all times thereafter submit themselves to and be bound by the said customs. It was then provided, that forasmuch as some matter or point of custom within the manor, not therein mentioned, might come in question, and doubts might be made of the true exposition of some matter or custom therein set forth, it was agreed between the parties that if any such matter, point, or custom, should come in question, it should be settled by a jury to be summoned as therein mentioned. And it was further agreed, that none of the ancient court rolls of the manor should be shewed or taken to prejudice or impugn any of the customs therein specified. This deed was confirmed in terms by a decree in Chancery, which contained a clause providing that it should not, nor should the said customs, extend but to the complainants and defendants (the copyholders who were parties to the deed, and the lord), and to the complainants' copyhold tenements, and should not be prejudicial to the lord concerning any other copyholds in the manor:—*Held*, that this deed was admissible in evidence, against a copyholder deriving title under one of the parties to it, to negative the existence of a custom of the manor for the copyholders to take the minerals under their re-

spective copyholds. *Semble*, that it would have been evidence for the same purpose, even against a copyholder not deriving title under any of the parties to it. *Marquis of Anglesey v. Lord Hatherton*, 218

MINES.

Construction of Demise of.

Covenant.—By an indenture of lease, the plaintiff demised to the defendant all mines and beds of coal, &c., which then had been, or thereafter during the demise should be discovered or opened under the lands belonging to Dyffryn House, at the yearly rent of £20, to be paid whether any coal should be worked or not, together with 7d. per ton for every ton of coal, &c., raised. And the defendant covenanted that he would at all times during the demise work the said mines in a proper and workmanlike manner. Breach, that the defendant did not work the said mines in a proper and workmanlike manner, but, on the contrary, permitted the mines to lie and the same were wholly ungotten. Plea, that the said mines were never at any time before the said demise worked or gotten, nor did he the defendant, at any time since or during the demise, work or get the mines:—*Held*, on demurrer, that inasmuch as it appeared by the pleadings that the mines had not been worked at all, the defendant was not liable on this covenant for not working them in a workmanlike manner, the subject-matter of demise being, not all the mines under the lands specified, but only such as either had been or should be discovered or opened. *Quarrington v. Arthur*, 335

NAVIGATION ACT.

By an act of Parliament, 6 & 7 Will. 4, c. ci, (local and personal), certain persons were incorporated for the

purpose of improving the navigation of the River Parrett, and they were thereby empowered to take tolls in respect of the transit or conveyance of goods thereon:—*Held*, that in the absence of any express enactment on the subject in the act, the duties of the company were confined to matters relating to the navigation, and that they were not liable for the sewerage of the river, as to clear away weeds, which, though injurious to the adjoining lands, were no detriment to the navigation. *Parrett Navigation Company v. Robins*, 593

NEGLIGENCE.

When actionable.

The general rule of law respecting negligence is, that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover. Therefore, where the defendant negligently drove his horses and waggon against an ass, which had been left in the highway fettered in the fore-feet, and thus unable to get out of the way of the defendant's waggon, which was going at a smartish pace along the road, it was held, that the jury were properly directed, that although it was an illegal act on the part of the plaintiff so to put the animal on the highway, the plaintiff was entitled to recover. *Davies v. Mann*, 546

NOTICE OF ACTION.

*See CONSTABLE.**To Magistrate.*

Where a notice of action to a magistrate was signed by the plaintiff himself, but indorsed by his attorney:—*Held*, that the notice was sufficient,

the indorsement by the attorney being all the stat. 24 Geo. 2, c. 44, s. 1, requires. *Held*, also, that service by the clerk of the attorney was sufficient, and that the notice need not be served by the attorney himself. *Morgan v. Leach*, 558

PALACE.

Exception of from Sewers' Rate.

An information of intrusion stated, that the defendants intruded and made entry on a certain messuage or dwelling-house, situate &c., and being parcel of the royal palace of Kensington, then *in the occupation of* our Lady the Queen, and which was in the hands and possession of the Queen in right of her Crown. The defendants pleaded, in the form given by the stat. 23 Hen. 8, c. 5, s. 11, that they committed the trespasses under the authority of a commission of sewers, for tax assessed by the said commission:—*Held*, on demurrer, that this form of plea was not allowable in an information of intrusion at the suit of the Crown. A distress cannot be levied for sewers' rates within the precincts of a royal palace, occupied as the residence of the Sovereign; and Kensington Palace is within this description. But *semble*, that the averment in this information did not sufficiently show the palace to be the *residence* of the Sovereign. *Attorney-General v. Donaldson*, 117

PARTICULARS OF DEMAND.

See TRESPASS.

1. *Indebitatus assumpsit* by the assignees of a bankrupt. The first four counts were for goods sold, money paid and had and received, and on an account stated, laying the promises to the bankrupt; the 5th, 6th, and 7th

counts were for goods sold, money had and received, and on an account stated, laying the promises to the assignees. Pleas, first, except as to 320*l.* parcel, &c., and except as to 140*l.* parcel of the sums in the first, second, third and fourth counts mentioned, non assumpsit. Secondly, as to the said sum of 140*l.*, parcel of the monies in the first, second, third, and fourth counts mentioned, a plea of mutual credit, which had been demurred to, and on argument judgment given for the defendant. Thirdly, as to the 320*l.* payment of that sum into Court, which the plaintiffs took out and joined issue, on the plea of non assumpsit. The following were the particulars of demand delivered prior to the pleas. "This action is brought to recover the sum of 140*l.*, the value of certain yarn; also the sum of 316*l.*, the proceeds of a bill of exchange, drawn by J. M. and indorsed by the bankrupt to the defendant; also, 4*l.*, the proceeds of a cheque; and 80*l.* in cash; the said yarn, bill of exchange, cheque and cash having been received by the defendants from or by the authority of the bankrupt, about the months of September or October, 1839. The particular date is known to the defendants." At the trial, the cause proceeded for the recovery of the sum of 140*l.* only, and no evidence was adduced as to the 80*l.* cash. It was objected that the plaintiffs were not entitled to go into evidence as to the 140*l.*, as that sum was already satisfied by the judgment upon the demurrer, and that that sum must be struck out of the particulars of demand; but the learned judge received the evidence, giving the defendant leave to move to enter a nonsuit. A rule having been accordingly granted on that ground—*Held*, that the plaintiff was entitled to give evidence of goods sold to the amount of 140*l.*, upon the other counts

of the declaration, to which the plea was not pleaded, and might apply the particulars to those counts. *Russell v. Bell*, 340

2. The first count of a declaration in assumpsit alleged that the plaintiff was employed by the defendants as a carman, at wages after the rate of 160*l.* a year, and claimed damages for his discharge without just cause during the year; there was also a count for work and labour. The particulars of demand stated, that the plaintiff, besides seeking to recover damages under the special count, also sought to recover, under the indebitatus count, 37*l.*, the balance of account for a quarter's work done by him for the defendants, commencing on the 30th June, and ending on the 30th September, 1842, after giving credit for 3*l.* paid on account thereof. It appeared in evidence that the plaintiff was discharged on the 30th July, 1842, for misconduct, which the jury found to be a sufficient cause for his dismissal; that he worked out that day, and that on the next morning the defendants sent for him, and he remained working there that day also, and then left. The jury found that the value of those two days' work was 40*s.*, but that he was entitled to a month's wages, and he accordingly had a verdict for 10*l.* 6*s.* 8*d.*, allowing for the 3*l.*, which had been paid in advance:—*Held*, that the plaintiff was not precluded by his particulars from recovering this sum. *Hurcum v. Stericker*, 553

3. Declaration in assumpsit contained three counts; the first, on a promissory note for 50*l.*; the second, on another note to the like amount; and the third for 100*l.* on an account stated. The particulars of demand were as follows: "This action is brought to recover the sum of 50*l.*, being the amount of the promissory

note in the first count of the declaration mentioned, and also the further sum of 50*l.*, the amount of the promissory note in the second count mentioned. Above are the particulars of the plaintiff's demand, for the recovery whereof he will avail himself of the whole or any part of the declaration." No evidence of the promissory notes was given at the trial, but a conversation with the defendant was proved, in which he acknowledged he owed the plaintiff 100*l.*:—*Held*, that the particulars were insufficient to enable the plaintiff to recover, and that, in order to do so, he was bound to prove an admission or an account stated with reference to the promissory notes.

Roberts v. Elsworth, 653

PARTNERSHIP.

1. By a deed dated 7th May, 1839, a company was formed called the West Mining Association, of which the defendants were directors. The plaintiff, by an agreement dated 10th July, 1839, agreed to sell to this company 1000 shares in the Pennance Mills Mining Company, to be paid for by the sum of 1385*l.*, and by the delivering to him of 200 scrip certificates of shares in the West Mining Association. The money was to be paid on the 1st of August, 1841. Immediately upon the execution of the agreement, 200 scrip certificates were obtained by the plaintiff's agent, and entered in the register book of the West Mining Association in the plaintiff's name. The defendants afterwards gave the plaintiff the following promissory note, dated August 17, 1839: "We jointly promise to pay to J. F. (the plaintiff) 1385*l.*, on the 1st of August, 1841, for value received in Pennance shares pursuant to annexed contract." This note was signed by all the defendants in their

individual names. The deed of settlement of the West Mining Company provided that holders of scrip certificates should not be considered as qualified proprietors; and that a certain proportion of the net profits of the year should be divided amongst the shareholders and scrip-certificate holders, in proportion to their several shares and interests. The plaintiff had not paid any instalments nor signed the deed of settlement, but continued to be the holder of the scrip certificates:—*Held*, in an action brought upon the note, that a plea that the defendants made the note as directors and on behalf of the mining co-partnership, and that the plaintiff was a partner with the defendants, was not supported by proof of the above facts. *For v. Frith*, 131

2. A., B., and C. verbally agreed that they should bring out and be jointly interested in a periodical publication. A. was to be the publisher, and to make and receive general payments, B. to be the editor, and C. the printer; and after payment of all expenses, they were to share the profits of the work equally. C. was to furnish the paper, and charge it to the account at cost prices. No profits were ever made, nor any accounts settled. The plaintiff furnished paper to A., for the purpose of being used by him in printing the periodical:—*Held*, that B. and C. were not jointly liable with A. for the price of it.

Wilson v. Whitehead, 503

PATENT.

Notice of Objections to.

To a declaration for the infringement of a patent, the defendant pleaded, that the nature of the invention and the manner in which it was performed were not particularly described

in the specification; and also, that the invention was not new: and the objections delivered with the pleas under 5 & 6 Will. 4, c. 83, s. 5, stated, first, that the specification did not sufficiently describe the nature of the invention and the manner in which it was to be performed; and secondly, that the invention was not new, and had been wholly or in part used and made public before the obtaining of the letters patent:—*Held*, that the first of these objections was sufficient, but that the second was bad, and ought to have pointed out what portions of the alleged invention were previously in use. *Heath v. Unwin*, 684

PAUPER.

Exemption of from Costs.

1. A plaintiff suing in formâ pauperis is exempted from the payment of interlocutory equally as of final costs. *Pratt v. Delarue*, 509

2. A person admitted to sue in formâ pauperis after the commencement of the suit, is liable, on nonsuit or verdict for the defendant, to the costs antecedent to the date of the order. *Doe d. Ellis v. Owens*, 514

PAVING ACT.

By a local act of Parliament, paving commissioners were authorized to pave and cleanse certain streets, squares, &c., within a township, and to charge the expenses upon "the owners of buildings, ground, or land adjoining the said streets, squares," &c.: provided, that if certain sewers required enlarging, "the owners of houses, buildings, lands, grounds, or hereditaments," should pay only a certain proportion of the expense. B., a clergyman, being desirous of building a church, and setting out a church-

yard, purchased a plot of ground, which was conveyed to T. and O., as trustees for that purpose, and the church and churchyard having been built and set out accordingly, were duly consecrated. By the deed of consecration, the right of letting or otherwise disposing of the pews, vaults, and graves in the church and churchyard was reserved to B. The church and churchyard adjoined a street which had been paved by the commissioners. B. conveyed to the defendant in fee, by way of mortgage, the pews and vaults in and under the church remaining unsold, and so much of the churchyard as had not been sold, together with the rent, pensions, stipends, &c. thereunto belonging. The defendant received the rents and profits arising from the pews, vaults, and graves in the church and churchyard, and appropriated the same in part satisfaction of his debt:—*Held*, that the defendant was not liable to be charged, as he was not "the owner of buildings, ground, or land," within the meaning of the act. *Constables, &c., of Chorlton-upon-Medlock v. Walker*, 742

PLEADING.

See DETINUE.

INSOLVENT, (2).

JOINT-STOCK BANKING COMPANY.

PRACTICE, (2).

PRESCRIPTION ACT.

SALE BY AUCTION.

SLANDER.

VENDOR AND PURCHASER.

I. Declaration.

(1). *Against Sheriff on 8 Anne, c. 14, s. 1.*

A declaration in case against the sheriff, on the stat. 8 Anne, c. 14, for removing goods seized under a fi. fa.

without payment of arrears of rent due to the plaintiff, must shew distinctly that the tenancy in the premises subsisted at the time of the seizure of the goods: and this is not sufficiently averred by a statement, that the debtor heretofore, to wit, on &c., and for a long space of time then past, occupied certain premises as tenant thereof to the plaintiff, and that the defendant took certain goods "then lying and being in and upon the premises, so in the tenure and occupancy of" the debtor as aforesaid. *Riseley v. Ryle*, 101

(2). *In Covenant for Non-Payment of Mortgage-Money.*

Declaration in covenant stated, that by an indenture of assignment of certain leasehold premises, between the plaintiff, the defendant's testator, and W., the testator, for himself, his executors, &c., covenanted with the plaintiff to pay to W. the sum of 1200*l.*, and interest. By the indenture as set out in the plea, it appeared that the plaintiff had mortgaged the premises to W., with a proviso that if the plaintiff, his executors, &c., *six months after demand* in writing, should pay the 1200*l.* to W., W. would reconvey: that the assignment by the plaintiff to the testator was subject to the above indenture of mortgage to W., and to the payment to him of the said sum of 1200*l.* There was then a general covenant for payment by the testator to W. of the said sum of 1200*l.* The plea then alleged, that no demand in writing of payment of the sum of 1200*l.* was made upon the plaintiff:—*Held*, on demurrer to the plea, that the declaration was bad, since, as no demand of payment had been made by W. on the plaintiff pursuant to the proviso, the money was not due, and the defendant was not liable on his covenant. *Trott v. Smith*, 453

II. *Pleas in Abatement.*

In Case.

In an action on the case against a bailee of goods delivered to him for reward by the plaintiff, containing some counts charging a misuser of the goods, whereby they were lost to the plaintiff, and other counts in trover, the defendant cannot plead generally in abatement, that they were the goods of the plaintiff and other persons. A plea in abatement for the misjoinder of parties, pleaded to several counts, if bad as to any of them, is bad altogether, and there must be a general judgment of respondent ouster; although it would have been good if pleaded separately to the other counts. *Phillips v. Claggett*, 102

III. *Pleas in bar.*

(1). *When bad as amounting to not guilty—Duplicitv.*

Declaration in case stated, that the defendant was the agent of the plaintiff and P. for managing a plantation in the island of St. Christopher; that the plaintiff resided in England; that the plaintiff and P. were beneficially interested in the above estate in undivided moieties, and that the defendant was authorized by the plaintiff and P. to draw bills in their joint names, for the payment of monies owing by them in respect of supplies and necessaries for the estate, and the necessary expenses incurred in its management; that certain demands had been made, by persons in the island, upon P., for the payment of debts due from her, P., for necessities supplied for the benefit of the estate, before the defendant's appointment as agent, and for which, as the defendant knew, the plaintiff was not liable. Breach, that the defendant, in violation of his duty, and without

the knowledge or consent of the plaintiff, and for the purpose only of providing funds to satisfy the debts so owing by P., drew a bill in the joint names of the plaintiff and P., which was refused acceptance, and on which the plaintiff and P. were sued to judgment by the holder in the Court of Queen's Bench in St. Christopher, and to satisfy which judgment their estate was sold. Plea, that the said necessities, in respect of which the said bill was drawn, were provided for the benefit as well of the rights and interests of the plaintiff as of P. in the said estate, while they were jointly interested therein as in the declaration mentioned, and for their joint benefit, and that as well the rights and interests of the plaintiff as of P. in the estate were, according to the laws of the island, liable to the payment of that debt; and that the defendant, by the authority and with the leave and license of the plaintiff and P., drew the said bill:—*Held*, on special demurrer, that the plea was bad for duplicity:—*Held*, also, that the first part of the plea amounted to not guilty, inasmuch as in effect it denied the wrongful act alleged in the declaration, viz. the drawing of the bill for a purpose for which the defendant had no right under his authority to draw it. *Pickwood v. Neate*, 206

(2). *Actio non accrevit infra sex Annos.*

A plea, that the several *supposed* causes of action in the declaration mentioned did not accrue to the plaintiff within six years next before the commencement of the suit, is good. *Evestaff v. Russell*, 365

(3). *Plea of Statute of Frauds.*

To a declaration in assumpsit for goods sold, the defendant pleaded, that at the time when the defendant

became indebted to the plaintiff as in the declaration mentioned, he became indebted upon a contract for the sale of the goods therein mentioned, for a price exceeding 10*l*.; that the defendant, being the buyer thereof, did not accept nor actually receive the goods or any part thereof, nor give or pay any thing in earnest or to bind the bargain, or in part of payment, nor was any note or memorandum in writing of the bargain made and signed by the defendant or by his agent thereunto lawfully authorized:—*Held* bad on special demurrer, as being an argumentative denial of the contract stated in the declaration. *Leaf v. Tuton*, 393

(4). *Tender.*

Assumpsit on a promise by the defendants to pay £250 on the plaintiff delivering up certain goods, to wit, 2000 hats, on which he had a lien; and the declaration alleged that the plaintiff was ready and willing, and tendered and offered, to deliver up the hats, and to abandon his lien, but that the defendants refused to accept them. Plea, that the tender was of two closed casks, which the plaintiff represented contained the said hats, which was the readiness and willingness in the declaration mentioned; but that the defendants did not then, or at any other time, know, nor could they ascertain, the contents of the said casks, or whether the same contained the said hats, nor had they any opportunity of inspecting the contents of the said casks; and although the plaintiff was requested by them to open the casks and allow them to examine the contents thereof, and although the plaintiff had notice that they were willing to accept the hats and to pay the money; yet the plaintiff refused to permit the casks to be opened, or to allow them any inspection of the contents thereof:—*Held*,

on special demurrer, that the plea was bad; as being an argumentative denial of the tender. *Isherwood v. Whitmore*, 757

(5). *Giving Colour in Trover—Duplicity.*

Trover for two receipts. Plea, that before and at the time when &c. the defendants were lawfully possessed as of their own property of the same receipts, and that being so possessed, the defendants afterwards, and before the said time when &c., delivered the same to one J. D., to be kept by him to and for the use of the defendants, and that J. D. afterwards and before the said time when &c., delivered the same to the plaintiff; and that afterwards and before the said time when &c., the plaintiff casually lost the same out of his possession, and the same by finding came to the possession of the defendants; and that the defendants afterwards refused, upon the request of the plaintiff, to deliver the same to the plaintiff, as they lawfully might for the cause aforesaid, which is the same conversion of which the plaintiff has complained:—*Held*, that the plea was bad for duplicity, and for not confessing a conversion. *Acraman v. Cooper*, 585

See also post, IV. (1).

IV. *Replication.*

(1). *De Injuriâ.*

To a declaration against the acceptor of a bill of exchange for 16*l.* 12*s.*, drawn by F. & G., and indorsed by them to the plaintiff, the defendant pleaded as follows:—1st, That after the bill became due, F. & G., being then the holders, applied to the defendant for payment of the bill; that the defendant paid them 7*l.* 2*s.*, which, together with the price of a horse which the defendant had sold to

F. & G., and the price of which, it was agreed between them, should be set off and allowed against the defendant's acceptance, F. & G. accepted in satisfaction and discharge of the bill; and that the bill was not indorsed to the plaintiff until after the said satisfaction and discharge, and after it became due. 2ndly, That before the bill came into the possession of the plaintiff, it was indorsed in blank by F. & G. to C. & Co.; and that after it became due, it being then in the hands of C. & Co., F. & G. gave C. & Co. another bill, accepted by them, for the same amount, which C. & Co. received on account of the first-mentioned bill, and which was paid by F. & G. at maturity; that after the second bill was so given, the defendant paid to F. & G. 7*l.* 2*s.*, &c. &c. [as in the first plea]; that at the time of the giving of the second bill by F. & G. as aforesaid, and at the time of the said settlement between the defendant and F. & G., the bill in the declaration mentioned remained in the hands of C. & Co., and was not indorsed to the plaintiff until after the giving of the second bill by F. & G., nor until after it became due. To each of these pleas the plaintiff replied, "that the said plea, and the statements therein contained, in manner and form as the same are therein pleaded, are not true in substance and in fact;" concluding to the country:—*Held*, first, that the replication was bad on special demurrer, as being an informal *de injuriâ*: secondly, that the pleas were bad in substance, because they did not shew that the sum paid by the defendant, together with the price of the horse, equalled the amount of the bill of exchange. *Mitchell v. Cragg*, 367

(2). *Nul tiel record—Signature.*

A replication of *nul tiel record*, although it conclude with an ordinary

verification, does not require counsel's signature, and the erroneous conclusion does not render it a nullity, so as to entitle the defendant to sign judgment of non pros. *Thompson v. Nicholas*, 330

(3). *To plea of Set-off.*

To a plea of set-off, the plaintiff replied that, except as to 97l. 12s. 4d. parcel &c., he was not at the commencement of the suit, and at the time of plea pleaded, indebted modo et formâ; and as to 97l. 12s. 4d. parcel &c., that before the pleading of the replication, the plaintiff had paid that sum into court in a cross action brought against him by the defendant, which sum the defendant took out of Court in full satisfaction, &c., and entered a nol. pros. to the rest of the declaration; concluding with a verification:—*Held*, on special demurrer, that the replication was bad. *Briscoe v. Hill*, 735

(4). *Traverse, when too large.*

Assumpsit by the indorsee against the acceptor of a bill of exchange. Plea, that being indebted to J. M., he the defendant accepted the bill and delivered it to the drawer for a special purpose, viz. that it might be discounted by him, and the proceeds paid to J. M. in satisfaction of the debt: the plea then averred that the drawer held the bill for such special purpose, and for the sole use and benefit of the defendant. Replication, that the drawer did not hold the bill for the said special purpose, and for the sole use and benefit of the defendant:—*Held*, that the traverse was not too large, as it did not compel the defendant to prove more than he would otherwise be bound to prove in support of his plea. *Eden v. Turtle*, 635

V. *Demurrer.*

Effect of its being too large.

Semble, that where there is a de-

murrer to two counts or two pleas, one of which is bad, and the other good, the Court ought to give judgment on the whole record, according to the truth, and not to overrule the demurrer as being too large. *Briscoe v. Hill*, 735

VI. *In Trespass.*

Issue on Right of Way.

Trespass for breaking and entering the plaintiff's close, (which was set out by abuttals), and pulling down certain posts and bars standing thereon. Plea, that there was a public footway over the close, and that the defendants, because the posts and bars obstructed the way, pulled them down. Replication, traversing the footway:—*Held*, that on these pleadings the defendants were entitled to a verdict, on proof of a right of footway in any direction over the close, and were not bound to prove a way over the place where the posts and bars stood. *Weber v. Sparkes*, 485

VII. *Repugnancy on Record, when Error.*

Assumpsit on an agreement to build a house according to certain drawings, plans, and specifications, and to the satisfaction of the plaintiff, &c. The defendant pleaded, 1. non assumpsit; 2. that he did the works to the satisfaction of the plaintiff; 3. that before the breach the contract was rescinded; 4. leave and license; and also other pleas, alleging deviations from the contract by agreement with and command of the plaintiff. Issues having been joined and taken on these pleas, the cause was at the assizes referred to an arbitrator, who awarded a general verdict to be entered for the defendant. The verdict, and judgment thereon, having been entered accordingly:—*Held*, that the record was not

repugnant, so as to afford ground of error. *Cooper v. Langdon*, 785

PRACTICE.

(1). *Judgment as in case of nonsuit.*

1. In a town cause, where issue is joined in term, the defendant is entitled to move for judgment as in case of nonsuit in the next term but one, although no notice of trial have been given. *Heeles v. Kidd*, 76

2. Where, in an action against four defendants, issue had been joined against three of them, and the fourth had been discharged under the Insolvent Debtors' Act since the commencement of the action; the Court discharged with costs a rule for judgment as in case of a nonsuit, on the ground that no complete issue had been joined. *Jackson v. Utting*, 640

(2). *Rejoining Gratis.*

The term "rejoining gratis," means rejoining without a rule for that purpose; and therefore, where a defendant is under those terms, he has still four days from the delivery of the replication in which to rejoin; the only effect of that term being to dispense with the necessity of a rule to rejoin. *Adkins v. Anderson*, 12

(3). *Amendment of Postea.*

The plaintiff obtained an order to amend the postea at half-past nine o'clock on the 22nd of November, but did not draw it up until the 23rd, and it was not served until four o'clock on the 24th:—*Held*, that as no fresh step could have been taken by the defendant, the plaintiff had not abandoned the order. A judge's direction as to the amendment of a postea cannot be questioned in the Court above, for there is no power to compel the production of his notes of the trial. *Sandford v. Alcock*, 689

PRESCRIPTION ACT.

Pleading—Unity of Seisin.

In trespass qu. cl. freg., to a plea of enjoyment of a right of way over the plaintiff's close, by the occupiers of a close called W., for twenty years next before the commencement of the suit, under the stat. 2 & 3 Will. 4, c. 71, s. 2, the plaintiff replied, that before the period of twenty years mentioned in the plea, one W. C. was seised in fee, as well of the close mentioned in the declaration as of the close called W., and continued so seised during part of the said period of twenty years, to wit, until &c., when he died so seised:—*Held* bad on special demurrer; for that unity of seisin was not inconsistent with the right as alleged in the plea, and unity of possession (if that were meant by the replication) might have been given in evidence under a traverse of the right as alleged in the plea. *England v. Wall*, 699

PRINCIPAL AND AGENT.

See HUSBAND AND WIFE.

PROCESS.

(1). *Writ of Summons.**Description of Defendant.*

Where a defendant was described in a writ of summons as "R. S. of the city of London"—*Held*, that the description was insufficient, although it was stated in the affidavits that sometime before the issuing of the writ he had abandoned his house, and had no regular place of abode. *Semble*, that he ought to have been described as of his late abode. *Cotton v. Sawyer*, 328

(2). *Continuing Writs.**Form of Indorsement on.*

The indorsement on a second or

subsequent writ of summons, issued under the 2 Will. 4, c. 39, s. 10, to save the Statute of Limitations, must contain a memorandum, specifying the date, not only of the first writ, but of the return thereto. *Williams v. Williams*, 174

(2). *Amendment of.*

Where, after the argument of a demurrer to a replication setting out continuing writs in answer to a plea of the Statute of Limitations, the plaintiff was allowed to amend by stating the indorsement on the writ as containing the date as well of the return as of the writ, in conformity with the Uniformity of Process Act; the Court, on a subsequent application, also allowed the writs themselves to be amended accordingly. *Williams v. Williams*,

(3). *Jury Process.*

Consequences of defect in—Amendment of.

An application to set aside the verdict and judgment, on the ground that the cause was tried after the return day mentioned in the distringas juratores, must be made within the first four days of term next following. And *semble*, the Court will not, in such case, interfere at all on motion, but leave the party to his writ of error. The distringas juratores, instead of being made returnable on the first day of Michaelmas Term, was by mistake *tested* on that day, and commanded the sheriff to distrain the jurors, so that he might have their bodies on the 17th of June, before the Barons at Westminster, unless the Chief Baron should first come on the 15th of June, at the Guildhall of the city of London. The trial took place on the 25th of June. After error coram vobis brought by the defendant on the ground of this irregularity in the

process, the Court, on motion, allowed an amendment. *Cheese v. Scales*, 488

RAILWAY COMPANY.

(1). *Rights and Liabilities of, as Carriers.*

The Grand Junction Railway Company were authorized by their act of Parliament, 3 & 4 Will. 4, c. xxxiv, s. 156, to carry and convey upon the railway all such passengers, goods, merchandize, &c., as should be offered to them for that purpose, and to make such *reasonable charges* for such carriage and conveyance as they might from time to time determine on. Sect. 159 authorized the Company also to fix the sums to be charged in respect of small parcels, not exceeding 500 lbs. weight each. By the 4 Will. 4, c. iv, s. 19, they were empowered to carry passengers and goods on other railways, and to make such reasonable charges for such carriage as they should determine on. And by another act, the 3 Vict. c. xlix, s. 26, it was enacted, that the charges by the former acts authorized to be made for the carriage of passengers or goods should be at all times charged *equally*, and after the same rate in respect of all passengers, goods, &c., conveyed or propelled by a like carriage or engine, passing on the same portion of the line, and under the same circumstances. The Company published a list of rates for the carriage of merchandize, divided into seven classes, of which the lowest was 16s. and the highest 60s. per ton: and for "boxes, bales, hampers, or other packages, when they contained parcels or other packages or things under 112 lbs. weight each, directed, consigned, or intended for different persons, or for more than one person," they imposed a charge of 1d. per lb. weight:—*Held*, that this was not a *reasonable* charge in the

case of a package above 500 lbs. weight, made up by a carrier and directed to one person, although containing a number of parcels under 112 lbs. weight each, consigned or directed to different persons. The Company also became carriers on the London and Birmingham line, and published a list of charges for the carriage of goods from Manchester to London, among which "Manchester packs" were charged 3s. 3d. per cwt., or 65s. per ton. At the foot of this list was a notice, that "goods were brought to the station at Camden Town without extra charge," and that there was "no charge for booking or delivery in London." The Company made an agreement with C. & H., that the latter should carry from the station at Camden Town and deliver in London all such goods carried by the railway, and for so doing should receive 10s. per ton out of the entire charge of 65s. per ton:—*Held*, that, under these circumstances, the charge of 65s. per ton, when made to any other persons who were ready to receive their goods at the station at Camden Town, was both *unreasonable* and *unequal*. *Pickford v. Grand Junction Canal Company*, 399

(2). *Liability of, for Damage to House not scheduled.*

By a railway act, it was provided, that nothing in the act contained should authorize the company to take, injure, or damage, for the purposes of the act, any house or building which was erected on or before the 30th November, 1835, without the consent in writing of the owner or other person interested therein, other than such as were specified in the schedule to the act, unless the omission therefrom proceeded from mistake, &c. A subsequent clause contained provisions for settling all differences which might arise between the Company

and the owners or occupiers of any lands which should be taken, used, damaged, or injuriously affected by the execution of any of the powers granted by the act, and for the payment of satisfaction or compensation, as well for damages already sustained, as for future temporary, or perpetual, or any recurring damages:—*Held*, that the Company were liable, in an action on the case, to the reversioner of a house erected before the 30th November, 1835, and not specified in the schedule, for damage done to it by the obstruction of its lights by a railway station erected by the Company under the act, and by the dust, &c., drifted from the station and embankment into the house; and that the plaintiff was not bound to come in under the compensation clause. *Turner v. Sheffield and Rotherham Railway Company*, 425

(3). *Power to arch over public Thoroughfares.*

The Northern and Eastern Railway Company were entitled, under their acts of Parliament, the 6 & 7 Will. 4, c. ciii, and 2 & 3 Vict. c. lxxvii, to construct coverings or buildings by arches or otherwise over the public streets and thoroughfares, if it were necessary or reasonably convenient for the construction of their station, warehouses, &c., at Shoreditch, in like manner as they were entitled to do for the construction of the railway itself. *Attorney-General v. The Eastern Counties Railway Company and the Northern and Eastern Counties Railway Company*, 263

RECOVERY.

Operation of, when suffered under Mistake as to the Title.

A deed to lead the uses of a recovery by mistake treated an advowson as being in gross, when in fact it was

appendant to a manor; and recited, that A., being seised of the manor and advowson, devised the manor and other estates, *not including the advowson*, to B., for life, with remainders for life and in tail, and devised the residue of his real estate to B. and C. in fee, as tenants in common; and that B., being seised in fee of a moiety of the advowson *so devised to him as aforesaid*, made his will, and devised his real estate to his widow for life, with remainder to M. for life, with remainder to his issue in tail: and the deed then proceeded to convey the manor with its appurtenances, and also (inter alia) *the moiety, formerly of the said B. of and in the advowson*, to a trustee for the purpose of making a tenant to the præcipe to suffer a recovery, to enure to the use of M. for life, with remainder to his eldest son in fee. In fact, the will of A. contained a sufficient devise of the manor and the appendant advowson to B. for life, with remainders for life and in tail, and under this devise M. was in fact, at the date of the deed, tenant for life of the manor and advowson, with remainder to his eldest son in tail: and M., and his eldest son, were parties to the deed:—*Held*, that, although the premises in the recovery deed were in themselves large enough to have passed the whole advowson as appendant to the manor, yet that, by reason of the intention of the parties apparent on the face of the deed (although arising out of a mistake as to their title), the estate tail was not barred in one moiety of the advowson. *Moseley v. Motteux*, 533

RELEASE.

Of antecedent Rent.

In replevin, the defendant made cognizance for half a year's rent due at Michaelmas, 1841, for a farm held by the plaintiff under J. H. at a rent

SALE BY AUCTION.

of 86*l.*, payable half-yearly at Lady-day and Michaelmas: the plaintiff pleaded in bar, that by an indenture made between J. H. and the plaintiff, purporting to be made on the 1st of Feb., 1841, but which was in fact made after Michaelmas, 1841, and after the rent became due, J. H. released the plaintiff from the rent. The replication set out the indenture, which bore date 1st Feb., 1841, and was a lease from J. H. to the plaintiff of the farm, to hold from 30th July, 1840, for fourteen years, at a rent of 86*l.* payable half-yearly at Lady-day and Michaelmas, the first payment to be made at Lady-day next:—*Held*, that this was no release of the rent for which the cognizance was made. *Cooper v. Robinson*, 694

REMITTER.

See ESTATE TAIL.

REPLEVIN.

See BANKRUPTCY, (4).

Cognizance for Double Rent.

In a cognizance, by defendant as bailiff, for *double rent*, under the 11 Geo. 2, c. 19, s. 18, the terms of the tenancy, and of the notice to quit, should be so shewn, that the tenant's power to determine the tenancy by notice to his landlord for that purpose, and the sufficiency, in law, of the notice actually given, may appear. It is not sufficient (on *special demurrer*) to allege that the tenant "*having power to determine by such a notice as hereinafter mentioned*," gave a notice to quit on a given day past. *Humberstone v. Dubois*, 765

SALE BY AUCTION.

Auction Duty—Avoidance of Sale by Vendor.

Debt.—The declaration alleged, that the plaintiff, being employed, by

the defendants to sell certain lands by auction, put up the same for sale, subject to a condition that the highest bidder should be the purchaser: that one H. was the highest bidder, and declared by the plaintiff to be the purchaser, whereby auction duty to the amount of 94*l.* 18*s.* 9*d.* became payable by the plaintiff, and was paid by him: breach, in non-payment of that sum by the defendants.—Plea, by one of the defendants, that it was a conditional sale, that the purchaser should after the sale pay the auction duty; that upon exposure to sale, and H. being the highest bidder, payment of the duty was then demanded of him by the plaintiff, and refused by him, whereby his bidding became null and void.—Plea, by the other defendant, that the plaintiff at the time of the sale demanded payment of the duty from H., who refused to pay, and did not at the time of the sale or at any time since pay the same, whereupon the defendants then declared the said bidding and sale to be null and void, and the same became null and void.—Replication, that before H. became a bidder, it was collusively agreed between them and the latter defendant, that H. should bid, not with a view of completing the purchase, but merely to outbid another bidder, and that H. did so bid; that the plaintiff at the time of the auction had no notice either of the said agreement or of the intent of H. becoming a bidder; that the plaintiff at the said auction, and whilst H. was the highest bidder, closed the biddings, and H. then became the highest bidder, and was declared to be the purchaser; that H. refused to pay the auction duty; and that before his bidding no notice was given to the plaintiff by H. or by the defendants of H.'s being appointed and having agreed to bid at the sale for the use and behoof of the defendants:—*Held*, first, that the de-

claration was good, and that the replication was not a departure from it. Secondly, that the former plea was bad, as it did not shew that the vendors had exercised their option of declaring the bidding to be null and void. Thirdly, that the latter plea was bad, as it did not shew that the vendors had, at the time and place of auction, exercised their option of declaring the bidding to be void, or had notified the same to the plaintiff. Fourthly, that the 19 Geo. 3, c. 56, has not repealed the 7th sect. of 17 Geo. 3, c. 50. Where defendants plead separately pleas which are demurred to, the pleas and demurrers being substantially the same, each defendant is not entitled to appear by separate counsel on the argument of the demurrer. *Willson v. Carey*, 641

SCIRE FACIAS.

See JOINT-STOCK COMPANY, (2).

SEQUESTRATION.

Sequestrator's Interest.

The sequestrator of a benefice, appointed by the bishop under a writ of *sequestrari facias*, is the mere bailiff or agent of the bishop, and has no such interest in the profits as will enable him to maintain an action at law against a party who wrongfully receives them. *Harding v. Hall*, 42

SET-OFF.

See PLEADING, IV, (3).

SEWERS' RATE.

See PALACE.

SHERIFF.

See PLEADING, I, (1).

SLANDER.

Pleadings.(1). *Justification.*

To a declaration for words, imputing to the plaintiff, a pawnbroker, that he had committed the unfair and dishonourable practice of duffing, that is, of replenishing or doing up goods, being in his hands in a damaged or worn-out condition, and pledging them with other pawnbrokers, the defendant pleaded, that the plaintiff did replenish and do up divers goods, being in his hands in a damaged or worn-out condition, and pledge them with divers other pawnbrokers:—*Held* bad on special demurrer, as not being sufficiently specific. *Hickinbotham v. Leach*, 361

(2). *Proof of introductory averments.*

Slander.—The declaration, after reciting that A. and B., the plaintiffs, were lawful husband and wife, and that B. was the lawful sister of one C. alleged that the defendant spoke of and concerning the plaintiff B. and her intermarriage, and of and concerning C., the false, &c. words following: "It has been ascertained beyond doubt that C. and B. are not only brother and sister, but man and wife."—*Held*, first, that the plaintiffs were not bound to prove the introductory averment that B. was the lawful sister of C.; secondly, that the declaration was not bad in arrest of judgment. *Heming v. Power*, 564

SPECIAL JURY.

Certificate for, when grantable.

The words in the 6 Geo. 4, c. 50, s. 34, as to the costs of a special jury, that unless the judge "shall immediately after the verdict certify, &c." mean that the judge shall certify within a reasonable time after. *Christie v. Richardson*, 688

STAMP.

(1). *On Copy.*

Where, on the non-production of a deed after notice to produce, the opposite party calls a witness who proves a copy compared by him with the original deed, such copy may be read without being stamped; for it is only used, in point of law, to refresh the witness's memory as to the contents of the deed. *Braythwayte v. Hitchcock*, 494

(2). *Unstamped Instrument, when admissible.*

On an issue to try the property in certain goods, which the plaintiff claimed under a bill of sale, a former bill of sale of the same goods, but which had been cancelled, was tendered in evidence to shew that the second bill of sale was given bona fide, and not fraudulently. This document having been rejected at the trial, on the ground that it was not stamped:—*Held*, that it was properly rejected, and was inadmissible without a stamp. *Williams v. Gerry*, 296

STOPPAGE IN TRANSITU.

H. & Co., of Hull, having sold to W., of Mickley Mills, near Leeds, twenty mats of flax, they were, on the 10th of August, sent by railway to Leeds, and arrived at the defendants' warehouse at Leeds, where it was the custom for the defendants to receive goods sent for W., and to give him notice of their arrival, and for him to send his carts for them. On the 16th of August, W. sent his cart and took away ten of the mats. On the 18th of August, H. & Co. sold to W. twenty other mats of flax, and a quantity of other goods. The flax was sent by railway to Leeds, and arrived duly at the defendants' warehouse; the other goods were sent by sloop to Boroughbridge. On the arrival of this flax at

the defendants' warehouse, notice was given to W. by letter, which stated, that unless the goods were sent for, they would remain there at warehouse rents. On the 23rd of August, W. sent his cart and took away ten of the latter mats, and left there ten of the mats last sent, and ten of the former. On the 8th of September, W. having become insolvent, the goods which had been shipped for Boroughbridge were stopped in transitu at Hull; and on the same day the ten mats of flax of the second parcel were also stopped at Leeds by H. & Co. On the 11th September the sheriff entered, and seized all the flax in the defendants' warehouse sent by H. & Co., under an execution against W. On the 15th of September, there was also a stoppage by H. & Co. of the remaining ten mats of the first parcel. It was found by the jury at the trial, that the parties contemplated that the goods were to be used for the purpose of manufacture at Mickley Mills:—*Held*, under the above circumstances, that the transitus was at an end on the arrival of the goods at the defendants' warehouse. *Held*, also, that the stoppage of the goods which had been shipped to go to Boroughbridge had not the effect of revesting the property in the parcel of flax which had been sent to the defendants' warehouse at Leeds, although comprised in one joint contract with the other goods. *Semble*, Lord Abinger, C. B., *dissentiente*, that the effect of a stoppage in transitu is not to rescind the contract, but only to replace the vendor in the same position as if he had not parted with the possession of the goods:—*Held*, that, at all events, the vendor had no right to retake that part which had arrived at its journey's end. *Wentworth v. Outhwaite*, 436

SUBPCENA.

See WITNESS, (2).

TENDER.

See PLEADING, III. (4).

TRESPASS.

See PLEADING, VI.

Particulars, when granted in.

The Court will not grant particulars in an action of trespass, on the mere affidavit of the defendant that he had read the declaration, and that from the general and vague form thereof he was unable to ascertain the grievances on which the plaintiff intended to rely; but some special ground must be shewn as a reason for granting the rule. *Horlock v. Lediard*, 677

TROVER.

See PLEADING, III. (5).

TRUSTEE.

Bond given by to Co-Trustee, on Loan of Trust Money, Validity of and Liability on.

A testator devised his real and personal estate to D. and R., upon trust to sell, and to invest the sum of £10,000, arising therefrom, in the public funds or real securities, for the benefit of certain persons mentioned in the will. The money was not so invested, but with D.'s consent was received by R., and used by him in his private trade; and R. gave to D. a bond, conditioned to keep him harmless and indemnified against all actions, suits, proceedings, claims, demands, loss, costs, charges, damages, and expenses, on account of the said sum of £10,000, or by reason of R.'s being permitted to hold the same:—*Held*, that this bond was valid in law. The legatees having filed a bill in Chancery against the trustees and their representatives, claiming payment of the £10,000 and interest, obtained a decree whereby it was declared that D.

VENDOR & PURCHASER.

and R. were jointly and severally liable to pay that sum: and the legatees carried in a claim against D.'s estate for that amount, but no money was received therefrom:—*Held*, that the representatives of D. were entitled to recover from R., in an action on the bond, the whole amount of £10,000 and interest, and that their claim was not limited to the amount of costs actually incurred and paid by them in the Chancery suit. *Warwick v. Richardson*, 284

TURNPIKE TOLLS.

The stat. 3 & 4 Vict. c. 33, is merely a declaratory act, and does not create any new exemption from toll. In an action of debt by the trustee of a turnpike road against a lessee of tolls, the defendant pleaded, that, after the time of the demise to him, and before any rent became due, the stat. 3 & 4 Vict. c. 33, was passed, which took away certain of the tolls, and therefore the lease was void:—*Held* bad on general demurrer. *Harries v. Morrice*, 260

VENDOR AND PURCHASER.

Action by Vendor for Purchase-Money, necessary Averments in.

Assumpsit. The declaration alleged, that by an agreement made between the plaintiff and the defendant, the plaintiff agreed to sell, and the defendant to buy, certain building ground for the sum of 120*l.*, which the defendant agreed to pay the plaintiff on or before the expiration of four years, with interest at 5*l.* per cent. half yearly, until paid; and it averred that the four years had not expired; that the 120*l.* had not been paid; and that 12*l.* had become due for interest:—*Held*, that the declaration was good, and that the plaintiff was not bound to aver that he had delivered

WITNESS.

possession of the land, or that he had title to the land, or was ready and willing to convey it. *Wilks v. Smith*, 355

WARRANT OF ATTORNEY.

See BANKRUPTCY, (2).

WAY.

See PLEADING, VI.

WITNESS.

(1). *Competency.*

1. The widow of a person who has died intestate is not a competent witness, in an action brought against a person (who has got possession of the intestate's goods) as executor de son tort, for a debt due from the estate, to prove the due execution of a bill of sale of his goods by the intestate to the defendant. It is not too late to object to the competency of a witness after he has been sworn in chief, but before he has been asked any question on oath. *Yardley v. Arnold*, 141

2. The plaintiff, having been employed by the defendant to do certain work for him, employed C. to assist him in doing the work, upon the terms that when the plaintiff earned 1*l.*, C. was to have 8*s.* and the plaintiff 12*s.*, and which sum C. was to be paid whether the plaintiff was paid or not, and for which he swore that he looked only to the plaintiff for payment:—*Held*, in an action brought by the plaintiff to recover the price of the work, that C. was rendered a competent witness for the plaintiff, by indorsing his name on the record under 3 & 4 Will. 4, c. 42, s. 26. *Carr v. Adams*, 282

3. S., being in insolvent circumstances, assigned his effects to the defendant, in trust to sell, and distribute the proceeds rateably among his creditors, of whom the plaintiff was one.

The sale realized 2s. 6d. in the pound on the amount of the debts, and the defendant promised the plaintiff to pay him his proportion:—*Held*, in an action for money had and received, brought by the plaintiff against the defendant to recover such proportion, that S. was a competent witness for the plaintiff. *Hawley v. Cadbury*, 505

(2). *Attachment for Disobedience to Subpoena.*

A subpoena requiring the party to attend the trial of a cause on the commission day of the assizes, extends to the whole assizes; and it need not go on to require his attendance "from day to day until the cause is tried." *Seemle*, it is not sufficient, in answer to an application for an attachment against a witness for disobedience to a subpoena, to shew that his evidence was not material. In answer to a motion for an attachment, the witness swore, that he had been for some time in bad health; that on the day before the trial came on, he had been in readiness to attend and give evidence; that on the morning of the trial he was unwell, and did not rise until ten o'clock, and that on going shortly afterwards to his office, which was in his way to the Court, he

found the cause had been tried. The Court discharged the rule. *Scholes v. Hilton*, 15

WRIT OF ERROR.

See PLEADING, VII.

WRIT OF TRIAL.

Jury to be summoned under.

A cause was tried under a writ of trial directed to the sheriff of Cambridgeshire, by a jury of persons resident in the town of Cambridge, none of whose names were on the jury list for the county; but as it appeared that the defendant's attorney had seen and looked over the list of jurors before they were sworn, and had expressed himself, satisfied, the Court held that the defendant was thereby precluded, after verdict for the plaintiff, from objecting to the irregularity. *Quære*, whether there is any right of challenge of jurors, on the trial of a cause, under a writ of trial. *Pryme v. Titchmarsh*, 605

2. *To Coroner.*

Seemle, that the Court has no power, under 3 & 4 Will. 4, c. 42, s. 17, to direct a writ of trial to the coroner. *Levy v. Magnay*, 664

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